

12-29-2009

Watson v. Joslin Millwork, Inc. Agency Record Dckt. 37166

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ROBERT A. WATSON,

Claimant/Appellant,

v.

JOSLIN MILLWORK, INC., Employer,
and LIBERTY NORTHWEST INSURANCE
CORPORATION, Surety,

Defendants/Respondents.

AGENCY RECORD

E. Scott Harmon
PO Box 6358
Boise, ID 83707

COPY

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LIST OF EXHIBITS

Reporter's Transcript taken December 19, 2008, will be lodged with the Supreme Court.

Claimant's Exhibits:

1. Workers Compensation First Report of Injury or Illness Forms
2. Written Statements from Claimant's Project Manager & Production Supervisor
3. Description of Sawyer's Job Duties for Robert A. Watson
4. Claimant's 5-16-08 Recorded Statement
5. Advanced Chiropractic Medical Records
6. St. Alphonsus RMC Medical Records
7. Psychiatrist James H. Bates, M.D., Medical Records
1st Supplement to Exhibit No. 7
8. Neurological Surgeon, R. Tyler Frizzell, M.D., Medical Records
Stipulation to Augment Hearing Exhibit No. 8
9. Claimant's Diagnostic Test Reports
10. Claimant's Correspondence To/From Defendants and Defendants' Correspondence To/From Claimant
11. Summary of Claimant's Past Medical expenses/Itemized Billing Statements
12. Defendants' Answers to Claimant's First Set of Interrogatories
13. Claimant's Prior Chiropractic Records/Scott Meissner, D.C.
14. Liberty Northwest's IME Physician's Report/Michael S. Weiss, M.D.

Defendants' Exhibits:

- A. St. Alphonsus Regional Medical Center Medical Records
- B. St. Luke's History & Physical
- C. Dr. Scott Meissner, D.C., Medical Records
- D. Dr. James Bates Medical Records
- E. Dr. Ranc Medical Records
- F. Dr. Michael Weiss Medical Report
- G. Claimant's Answers to Discovery, w/o attachment

Depositions:

1. Deposition of Michael S. Weiss, M.D., taken January 27, 2009

Additional Documents:

1. Claimant's Opening Post-Hearing Brief, filed April 13, 2009
2. Defendants' Responsive Brief, filed May 4, 2009
3. Claimant's Post-Hearing Reply Brief, filed May 7, 2009

SEND ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, 317 MAIN STREET, BOISE, IDAHO 83720-6000

WORKER'S COMPENSATION COMPLAINT

I.C. No. 2008-017579

CLAIMANT'S NAME AND ADDRESS

Robert A. Watson
1912 W. Tendoy Dr.
Boise, Idaho 83705

CLAIMANT'S ATTORNEY'S NAME AND ADDRESS

Rick D. Kallas
ELLSWORTH, KALLAS, TALBOY &
DEFRANCO, P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712

EMPLOYER'S NAME AND ADDRESS

Joslin Millwork, Inc.
6467 Supply Way
Boise, Idaho 83716

WORKERS' COMPENSATION INSURANCE CARRIER'S
(NOT ADJUSTER)
NAME AND ADDRESS

Liberty Northwest Insurance
6213 North Cloverdale Rd.
Suite # 150
P.O. Box 7507
Boise, Idaho 83707-1507

CLAIMANT'S SOCIAL SECURITY NO.

CLAIMANT'S BIRTHDATE

DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE

05/08/2008 = Date of Manifestation

STATE AND COUNTY IN WHICH INJURY OCCURRED

Ada County, Idaho

WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY
WAGE OF:

\$560.00 PER WEEK., PURSUANT TO §72-419, IDAHO CODE

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED):

The Claimant contracted / incurred an occupational disease in his low back as the result of performing his job duties for Joslin Millwork, Inc., which consisted of reaching, grabbing, lifting, carrying, twisting, turning, pushing pulling and bending over at a fast pace.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE:

Low back occupational disease in the form of a moderate sized left paracentral disk herniation at L5-S1 with an extruded fragment.

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME:

All workers' compensation benefits available under Idaho law including, but not limited to the following:

- (1) Medical Benefits;
- (2) Temporary disability benefits during the period of disability / recovery;

- (3) Permanent Physical Impairment (PPI) Benefits;
- (4) Permanent disability in excess of impairment (PPD > PPI) benefits including total and permanent disability under the 100% method or the odd-lot doctrine (if applicable);
- (5) Retraining Benefits and Temporary Disability benefits during retraining (if applicable); and,
- (6) Attorney Fees (if applicable).

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER

TO WHOM YOU GAVE NOTICE

Verbal Notice of low back pain to Brian Leisten and Steve Schnee in November of 2007.

Written Notice of Manifestation of Occupational Disease and Claim For Worker's Compensation Benefits to Employer / Liberty Northwest on May 8, 2008.

HOW NOTICE WAS GIVEN :

☒ ORAL

☒ WRITTEN

☐ OTHER, PLEASE SPECIFY

ISSUE OR ISSUES INVOLVED :

- (1) Are Defendants liable for the payment of medical benefits?;
- (2) Are the Defendants liable for the payment of temporary disability benefits during the Claimant's period of disability / recovery?;
- (3) Are the Defendants liable for the payment of permanent physical impairment (PPI) Benefits?;
- (4) Are the Defendants liable for the payment of permanent disability in excess of impairment (PPD > PPI) benefits including total and permanent disability under the 100% method or the odd-lot doctrine (if applicable)?;
- (5) Are the Defendants liable for retraining benefits and temporary disability benefits during the period of retraining (if applicable)?; and,
- (6) Are the Defendants liable for the payment of attorney fees (if applicable)?

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☐ YES ☒ NO IF SO, PLEASE STATE WHY:

NOTICE: COMPLAINTS AGAINST THE *INDUSTRIAL SPECIAL INDEMNITY FUND* MUST BE FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

R. Tyler Frizzell, M.D., Ph.D.
222 N. 2nd Street
Suite 307
Boise, Idaho 83702

James H. Bates, M.D.
2020 S. Eagle Rd.
Meridian, Idaho 83642

Advance Physical Therapy
Miles Ranck, D.C.
6720 Overland Road
Boise, Idaho 83709

St. Alphonsus RMC
1055 N. Curtis Rd.
Boise, Idaho 83706

St. Lukes RMC
190 East Bannock Street
Boise, Idaho 83702

Intermountain Medical Imaging
927 W. Myrtle Street
Boise, Idaho 83702

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE ?

Undetermined at this time

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID , IF ANY ? Unknown WHAT MEDICAL COSTS HAVE YOU PAID , IF ANY?

UNDETERMINED AT THIS TIME.

I AM INTERESTED IN MEDIATING THIS CLAIM , IF THE OTHER PARTIES AGREE. ☒ YES

☐ NO

DATE

SIGNATURE OF CLAIMANT OR ATTORNEY

06/11/2008

Richard D. Kall

**PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIMS IS MADE FOR DEATH BENEFITS**

NAME OF DECEASED

DATE OF DEATH

RELATION OF DECEASED TO CLAIMANT

WAS CLAIMANT DEPENDENT ON DECEASED ?

☐ YES☐ NO

DID CLAIMANT LIVE WITH DECEASED AT TIME OF ACCIDENT ?

☐ YES☐ NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June 2008, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

Joslin Millwork, Inc.
6467 Supply Way
Boise, Idaho 83716

☒ U.S. mail, postage prepaid
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile

SURETY'S NAME AND ADDRESS

Liberty Northwest Insurance
6213 North Cloverdale Rd.
Suite # 150
P.O. Box 7507
Boise, Idaho 83707-1507

☒ U.S. mail, postage prepaid
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile


Tiffany Llanos

NOTICE! An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing, to avoid default. *If no answer is filed, a Default Award may be entered!*

Further information may be obtained from: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000 (208) 334-6000

INDUSTRIAL COMMISSION
P.O. BOX 83720
BOISE, ID 83720-0041

Patient Name: Robert A. Watson
Birth Date: [REDACTED]
Address: 1912 W. Tendoy Drive
Boise, Idaho 83702
Phone Number: (208) 703-7952
SSN or Case Number: [REDACTED]

(Provider Use Only)

Medical Record Number _____

☐ Pick up Copies

☐ Mail Copies

ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:
Provider Name – must be specific for each provider

To: _____
Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City

State

Zip Code

Purpose or need for date: Worker's Compensation Claim
(e.g. Worker's Compensation Claim)

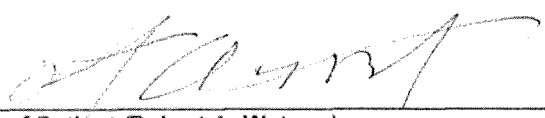
Information to be disclosed: _____ Date(s) of Hospitalization/Care: _____

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug/Alcohol Abuse Information

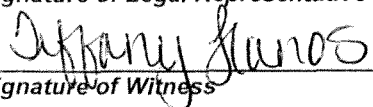
I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. **Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.** Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.


Signature of Patient (Robert A. Watson)

6-11-08
Date

Signature of Legal Representative & Relationship to Patient/Authority to Act

Date


Signature of Witness

Title

6/11/08
Date

Rick D. Kallas
Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.
1031 E. Park Blvd.
Boise, Idaho 83712
Telephone: (208) 336-1843
Facsimile: (208) 345-8945
Idaho State Bar No. 3872

Attorney for Claimant

2008 JUN 11 P 12:41
RECEIVED
INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT A. WATSON,

Claimant,

vs.

JOSLIN MILLWORK, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE
COMPANY,

Surety,

Defendants.

I.C. No. 2008-017579

**CLAIMANT'S NOTICE OF SERVICE OF
CLAIMANT'S DISCOVERY REQUESTS TO
DEFENDANTS**

NOTICE IS HEREBY GIVEN that on the 11th day of June, 2008, I caused to be served upon the person(s) indicated below a true and correct copy of Claimant's First Set of Interrogatories and Claimant's First Request for Production of Documents and Things to Defendants, together with a copy of this Notice of Service, by the method indicated below:

EMPLOYER'S NAME AND ADDRESS

Brian Leisten
Joslin Millwork, Inc.
6467 Supply Way
Boise, Idaho 83716

SURETY'S NAME AND ADDRESS

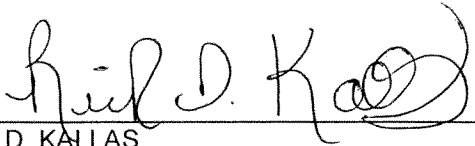
Julie Osler (Senior Claims Examiner)
Liberty Northwest Insurance
6213 North Cloverdale Rd., Ste. 150
P.O. Box 7507
Boise, Idaho 83707-1507

☒ U.S. mail, postage prepaid
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile

☒ U.S. mail, postage prepaid
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile

DATED this 11th day of June, 2008.

ELLSWORTH, KALLAS, TALBOY & DEFRANCO, PLLC

By: 
RICK D. KALLAS
Attorney for Claimant

Certificate of Service

I hereby certify that on the 11th day of June 2008, I caused to be served a true and correct copy of the foregoing Claimant's Notice of Service of Claimant's Discovery Requests To Defendants on the following persons by the method indicated below:

EMPLOYER'S NAME AND ADDRESS

Brian Leisten
Joslin Millwork, Inc.
6467 Supply Way
Boise, Idaho 83716

SURETY'S NAME AND ADDRESS

Julie Osler (Senior Claims Examiner)
Liberty Northwest Insurance
6213 North Cloverdale Rd., Ste. 150
P.O. Box 7507
Boise, Idaho 83707-1507

☒ U.S. mail, postage prepaid
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile

☒ U.S. mail, postage prepaid
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile


Tiffany Vanos

ANSWER TO COMPLAINT

I. C. NO. 2008-017579

ALLEGED INJURY DATE 5/8/08 (DATE OF MANIFESTATION)

| | |
|--|--|
| CLAIMANT'S NAME AND ADDRESS ROBERT A. WATSON 1912 w. Tendoy Dr. Boise, ID 83705 | CLAIMANT'S ATTORNEY'S NAME AND ADDRESS RICK KALLAS Attorney at Law 1031 E. Park Blvd. Boise, ID 83712 |
| EMPLOYER'S NAME AND ADDRESS JOSLIN MILLWORK, INC. 6467 Supply Way Boise, ID 83716 | WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS LIBERTY NORTHWEST INS. CO. P. O. Box 7507 Boise, Idaho 83707 |
| ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) E. SCOTT HARMON (3183) LAW OFFICES OF HARMON, WHITTIER & DAY P. O. Box 6358 Boise, ID 83707 | ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS) |

 X The above-named employer or employer/surety responds to Claimant's Complaint by stating:
 The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

| IT IS: (Check One) | | |
|--------------------|--------|---|
| Admitted | Denied | |
| | X | 1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed. |
| X | | 2. That the employer/employee relationship existed. |
| X | | 3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act. |
| | X | 4. That the condition for which benefits are claimed was caused partly ___ entirely ___ by an accident arising out of and in the course of Claimant's employment. |
| | X | 5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment. |
| X | | 6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease. |
| X | | 7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted. |
| | X | 8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ (not determined at this time) |
| X | | 9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act. |

10. What benefits, if any, do you concede are due Claimant?

NONE

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

A. Defendants deny all allegations of the Complaint not admitted herein.

B. Whether Claimant suffers from an occupational disease pursuant to Idaho Code Section 72-439;

C. Whether Claimant is entitled to medical benefits or indemnity benefits;

D. Whether Claimant has a permanent partial impairment and/or permanent partial disability arising out of the alleged occupational disease, and if so, appropriate apportionment.

E. Whether Claimant is entitled to retraining benefits

F. Whether Claimant is entitled to attorney fees.

G. Defendants reserve the right to amend this Answer since discovery in this matter has only just begun.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. ____ YES ____ NO

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

No

Amount of Compensation Paid to Date

Dated

Signature of Defendant or Attorney

PPD

TTD

Medical

\$-0-

\$-0-

\$-0-

7/2/08



PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 2008, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S ATTORNEY:

Rick Kallas
Attorney at Law
1031 E. Park Blvd.
Boise, ID 83712

via: ☒ personal service of process
☐ regular U.S. Mail

Signature

Answer—Page 2 of 2

✓

E. Scott Harmon
ISB 3183
LAW OFFICES OF HARMON, WHITTIER & DAY
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-6358
Telephone (208)327-7563
FAX 800-972-3213
Employees of the Liberty Mutual Group
Attorney for Defendants

**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

| | | |
|-------------------------------|---|-------------------------------|
| ROBERT A. WATSON, |) | |
| |) | |
| Claimant |) | I. C. No.: 2008-017579 |
| |) | |
| vs. |) | |
| |) | |
| JOSLIN MILLWORK, INC., |) | CERTIFICATE OF SERVICE |
| |) | |
| Employer, |) | |
| |) | |
| And |) | |
| |) | |
| LIBERTY NORTHWEST INS. CORP., |) | |
| |) | |
| Surety, |) | |
| |) | |
| Defendants. |) | |
| |) | |

7/9/08 JUL - 9 A 4: 36
RECEIVED
JUL 9 2008
JUL 9 2008

I hereby certify that on the 8th day of July, 2008, a true and correct copy of Defendants' Answers to Interrogatories and Responses to Request for Production of Documents was served by regular United States Mail, postage prepaid, upon the following at the address indicated:

Rick Kallas
Attorney at Law
1031 E Park Blvd.
Boise, ID 83712



E. Scott Harmon

Rick D. Kallas
 Idaho State Bar No. 3872
 Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C. 2008 AUG -5 PM 1:26
 1031 E. Park Blvd.
 Boise, Idaho 83712
 Telephone: (208) 336-1843
 Facsimile: (208) 345-8945

RECEIVED
 INDUSTRIAL COMMISSION

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

| | | |
|-----------------------------|---|--|
| ROBERT A. WATSON, |) | |
| |) | |
| Claimant, |) | I.C. No. 2008-017579 |
| |) | |
| vs. |) | CLAIMANT'S MOTION FOR EMERGENCY |
| |) | HEARING |
| JOSLIN MILLWORK, INC., |) | |
| |) | |
| Employer, |) | |
| |) | |
| and |) | |
| |) | |
| LIBERTY NORTHWEST INSURANCE |) | |
| CORPORATION, |) | |
| |) | |
| Surety, |) | |
| Defendants. |) | |
| |) | |
| |) | |

COMES NOW Claimant, Robert A. Watson, by and through his attorney of record, Rick D. Kallas, of the law firm of Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C. and pursuant to Idaho Code § 72-432, Idaho Code §72-804, J.R.P. 3(E) and J.R.P. 8(D), hereby moves this honorable Commission for an Order granting the Claimant's Motion for an Emergency Hearing to resolve the following issues:

- (1) Whether the Defendants are liable for the payment of all of the medical benefits necessary to treat the Claimant's lumbar spine occupational disease at L5-S1 including, but not limited to, the lumbar microdiscectomy "required by" the Claimant's attending physician, R. Tyler Frizzell, M.D.?
- (2) Whether the Defendants are liable for the payment of temporary total and / or temporary partial disability benefits (TTD / TPD) during the Claimant's period of recovery from his L5-S1 lumbar spine surgery?
- (3) Whether the Defendants are liable for the payment of attorney's fees based on their unreasonable DENIAL of worker's compensation benefits to the Claimant?

This Motion for Emergency Hearing is based on the following information which is incorporated herein by reference as though fully set forth:

1. The pleadings, motions and papers on file with the Industrial Commission;
2. The Affidavit of Rick D. Kallas filed in Support of Claimant's Motion For Emergency Hearing;
3. The Affidavit of Robert A. Watson filed in support of Claimant's Motion For Emergency Hearing; and,
4. The Claimant's Emergency Hearing Exhibits.

RESPECTFULLY SUBMITTED this 5th day of August, 2008.

Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.

By

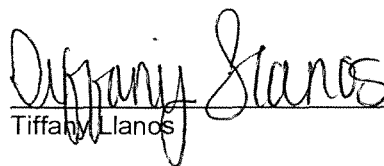

Rick D. Kallas - of the Firm
Attorneys for Claimant

Certificate of Service

I HEREBY CERTIFY that on the 5th day of August, 2008, I served Claimant's Motion For Emergency Hearing by the method indicated below and addressed to the following:

E. Scott Harmon
Law Offices of Harmon, Whittier & Day
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-7563

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile


Tiffany Llanos

Rick D. Kallas
Idaho State Bar No. 3872
Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C. 2008 AUG -5 PM 1: 26
1031 E. Park Blvd.
Boise, Idaho 83712
Telephone: (208) 336-1843
Facsimile: (208) 345-8945

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Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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| ROBERT A. WATSON, |) | |
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| |) | I.C. No. 2008-017579 |
| Claimant, |) | |
| |) | |
| vs. |) | CLAIMANT'S AFFIDAVIT IN SUPPORT OF |
| |) | MOTION FOR EMERGENCY HEARING |
| JOSLIN MILLWORK, INC., |) | |
| |) | |
| Employer, |) | |
| |) | |
| and |) | |
| |) | |
| LIBERTY NORTHWEST INSURANCE |) | |
| CORPORATION, |) | |
| |) | |
| Surety, |) | |
| Defendants. |) | |
| |) | |
| |) | |

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

Robert A. Watson, being first duly sworn on oath, deposes and states as follows:

1. I am the Claimant in the above-referenced worker's compensation claim and make this Affidavit based on my own personal knowledge.
2. I am presently 31 years old (DOB: [REDACTED]) I am married and have one (1) minor child.
3. I started working for Joslin Millwork, Inc. (hereafter Joslin) on or about September 14, 2005 and continued working for Joslin continuously until my low back began bothering me in the latter part of November 2007.

4. Since approximately 2006, I have been working as a Sawyer for Joslin. My job as a Sawyer requires me to perform the following physical movements with my body:

I use the forklift on the production floor to pick up a pallet / unit of laminated particle board (approximately 34 sheets) and move it into position near the beam saw. After placing the pallet / unit on the floor with the forklift, I have to physically reach out away from my body with both hands / arms and grab each individual 4 X 8 sheet off of the stacked pallet / unit. Each sheet weighs approximately 150 pounds. After I grab and lift the sheet, I have to twist and turn my body around approximately 180 degrees and then maneuver the sheet onto the saw and place it in the proper cutting position. I then perform cuts to specifications with the saw. After the product has been cut to specification, I will manually pick up each cut sheet and stack the individual cut sheets into a stack on the fall-off table which is attached to the saw. After I stack 4-6 individual cut pieces, I then manually grab the entire stack, lift it, turn and carry it approximately 15 – 20 feet where I place it on a parts' cart. The cart has 2 shelves. The upper shelf is approximately 40 inches off of the ground and the lower shelf is approximately 10 inches off of the ground. When I slide the cut pieces into the shelves, I bend and twist at the waist in order to manipulate and position the cut product. In order to place the cut product on the lower shelf, I have to bend all the way down almost to the floor and then bend over at the waist and slide the product onto the lower shelf by pushing with both arms outstretched away from my body. Most of the time, I have to stretch my leg out and place my right foot behind the wheel on the cart in order to prevent it from moving or slipping away during the shelving process. During a standard 8.0 hour work shift, I will lift, carry, twist, turn, bend at the waist, push and pull these laminate sheets approximately 6 out of every 8 hours or 75% to 80% of the time. As part of the production cycle, I am required to perform these physical movements repeatedly at a very fast pace (i.e., as fast as the saw will cut the product and as fast as I can move my body while lifting and carrying these heavy sheets of laminate).

5. In late November of 2007, I began experiencing low back pain which radiated down into my buttock and left leg. I did not know what was wrong with my back so I went to a chiropractor for an adjustment. After several visits with the chiropractor, I really wasn't getting any better so my chiropractor referred me to a Physiatrist by the name of James Bates, M.D.
6. When I saw Dr. Bates in January of 2008, I told him that I could not recall a specific accident that had caused injury to my low back. Dr. Bates ordered an MRI of my lumbar spine which I had done at Intermountain Medical Imaging on 1/24/08. When I went back to Dr. Bates to discuss the results of my MRI, he told me that I had a large disk herniation in my back at L5-S1 with a free floating fragment. Before resorting to back surgery, Dr. Bates suggested that we try an Epidural Steroid Injection (ESI). On 2/4/08, I had the ESI at Intermountain Medical Imaging, but it actually caused my pain to get worse instead of better. When my condition did not improve, Dr. Bates referred me to a neurosurgeon by the name of R. Tyler Frizzell, M.D.
7. Dr. Frizzell looked at my lumbar spine MRI and told me that I needed to have surgery to fix the

- large disk herniation that I had at L5-S1. Dr. Frizzell called the surgery a microdiscectomy.
8. On May 5, 2008, Dr. Frizzell wrote a letter to my attorney and gave his opinion that my job as a Sawyer at Joslin Millwork probably caused my L5-S1 disc herniation.
 9. My attorney wrote Joslin's workers' compensation insurance company, Liberty Northwest, a letter on May 8, 2008 putting them on notice of my low back occupational disease claim. In his May 8, 2008 letter, my attorney asked Liberty Northwest to authorize the L5-S1 microdiscectomy surgery that Dr. Frizzell had recommended to me. Liberty did not respond to my attorney's May 8, 2008 letter.
 10. On May 16, 2008, my attorney made our 2nd request for surgery authorization to Liberty Northwest, but **again** Liberty did not respond.
 11. On May 28, 2008, my attorney made our 3rd request for surgery authorization to Liberty Northwest, but **again** Liberty did not respond.
 12. Because Liberty refused to respond to my attorney's 3 requests for surgery authorization, my attorney recommended that we file a Complaint with the Industrial Commission. A Complaint was filed on or about June 11, 2008. My attorney served Liberty with discovery requests on the same date. Liberty answered our discovery requests on July 8, 2008.
 13. Liberty filed its Answer to the Complaint on or about July 2, 2008. Liberty served the Claimant with discovery requests on July 8, 2008. We responded to Liberty's discovery on or about August 4, 2008.
 14. I have instructed my attorney to file a Motion For An Emergency Hearing with the Industrial Commission on August 5, 2008 for the following reasons:
 - a. My low back pain is chronic and severe;
 - b. My left leg pain is sharp, throbbing, aching and constant;
 - c. I have been unemployed since approximately February 28, 2008 and need to get my back fixed so that I can return to gainful employment and support my family;
 - d. My inability to work and earn wages has caused my family to suffer severe financial stress. My family is moving from the home that we have lived in for 11 years and into my mother-in-law's house. My mother-in-law just passed away in June of 2008 and her

relatives have been generous enough to let me, my wife and our minor son move into her house because they know that I am not working and our mortgage payment will be less money. We will pay the estate \$775.00 per month for this house. I no longer have health insurance for my family because I am not working.

15. Joslin told me that they would bring me back to work after I got my back fixed. I have always been a good provider for my family and I desperately want to get my back fixed so I can return to work, get my health insurance reinstated and move forward with my life.
16. Please grant my request for an Emergency Hearing so that I can have the surgery recommended by Dr. Frizzell as soon as possible. Thank you for your consideration.
17. FURTHER Your affiant sayeth not.

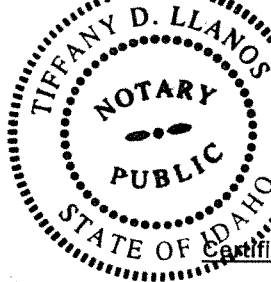
DATED this 5th day of August, 2008.

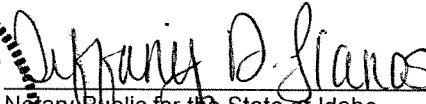


Robert A. Watson

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

SUBSCRIBED AND SWORN TO before me this 5th day of August, 2008.



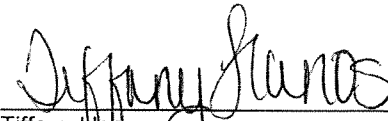

Notary Public for the State of Idaho
Residing at Boise Idaho
My Commission Expires: 3/13/12

Certificate of Service

I HEREBY CERTIFY that on the 5th day of August, 2008, I served Claimant's Affidavit In Support of Motion For Emergency Hearing by the method indicated below and addressed to the following:

E. Scott Harmon
Law Offices of Harmon, Whittier & Day
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-7563

- ☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile


Tiffany Llanos

Rick D. Kallas
Idaho State Bar No. 3872
Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.
1031 E. Park Blvd.
Boise, Idaho 83712
Telephone: (208) 336-1843
Facsimile: (208) 345-8945

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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INDUSTRIAL COMMISSION

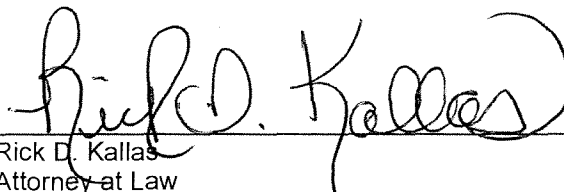
| | | |
|-----------------------------|---|--|
| ROBERT A. WATSON, |) | |
| |) | |
| Claimant, |) | I.C. No. 2008-017579 |
| |) | |
| vs. |) | |
| |) | AFFIDAVIT OF RICK D. KALLAS IN |
| JOSLIN MILLWORK, INC., |) | SUPPORT OF MOTION FOR EMERGENCY |
| |) | HEARING |
| Employer, |) | |
| |) | |
| and |) | |
| |) | |
| LIBERTY NORTHWEST INSURANCE |) | |
| CORPORATION, |) | |
| |) | |
| Surety, |) | |
| Defendants. |) | |
| |) | |
| |) | |

Rick D. Kallas being first duly sworn on oath deposes and states as follows:

1. I am an attorney authorized to practice law in the State of Idaho and make this Affidavit based on personal knowledge.
2. The Claimant, Robert A. Watson, hired me to prosecute his May 8, 2008 worker's compensation claim against employer / surety because employer / surety refused to authorize the L5-S1 microdiscectomy "required by" the Claimant's attending physician and surgeon, R. Tyler Frizzell, M.D.
3. On April 29, 2008, I wrote to the Claimant's attending neurosurgeon, R. Tyler Frizzell, M.D., and asked him provide me with a medical opinion that would allow me to determine if the Claimant had a compensable occupational disease claim (See **Exhibit A** attached hereto and incorporated herein by reference as though fully set forth).
4. On May 8, 2008, I received a letter from Dr. Frizzell dated May 5, 2008 which established that the

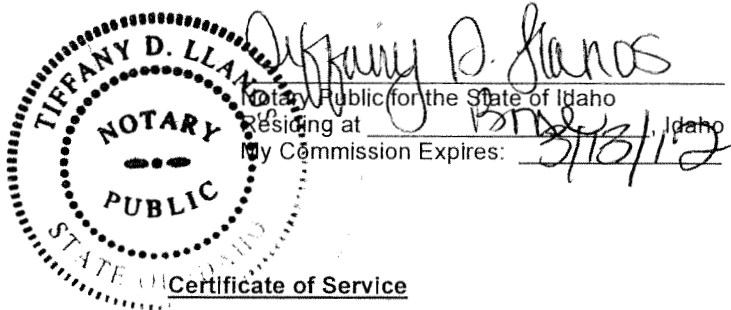
- Claimant had a compensable low back occupational disease claim. (See **Exhibit A** attached hereto and incorporated herein by reference as though fully set forth).
5. On May 8, 2008, I sent a letter to Liberty Northwest putting them on notice of the Claimant's low back occupational disease claim. In my May 8, 2008 letter, I asked Liberty Northwest to authorize the L5-S1 microdiscectomy surgery that Dr. Frizzell had recommended to the Claimant. Liberty did not respond to my May 8, 2008 letter. (See **Exhibit A** attached hereto and incorporated herein by reference as though fully set forth).
 6. On May 16, 2008, I sent Liberty Northwest my 2nd request for surgery authorization, but **again** Liberty did not respond. (See **Exhibit B** attached hereto and incorporated herein by reference as though fully set forth).
 7. On May 28, 2008, I sent Liberty Northwest my 3rd request for surgery authorization, but **again** Liberty did not respond. (See **Exhibit C** attached hereto and incorporated herein by reference as though fully set forth).
 8. Because Liberty refused to respond to my 3 requests for surgery authorization, I drafted and filed a Complaint with the Industrial Commission. A Complaint was filed on or about June 11, 2008. I served Liberty with discovery requests on that same date. Liberty answered our discovery requests on July 8, 2008.
 9. Liberty filed its Answer to the Complaint on or about July 2, 2008. Liberty served the Claimant with discovery requests on July 8, 2008. We responded to Liberty's discovery on or about August 4, 2008.
 10. Both parties have exchanged discovery requests and answers thereto. The issues in the Claimant's Motion For Emergency Hearing are now ripe for determination by the Industrial Commission and the Claimant respectfully requests the first available Emergency Hearing date.
- FURTHER your Affiant sayeth naught.

RESPECTFULLY SUBMITTED this 5th day of August, 2008.


Rick D. Kallas
Attorney at Law

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

SUBSCRIBED AND SWORN TO Before me this 5th day of August, 2008.



I HEREBY CERTIFY that on the 5th day of August, 2008, I served the Affidavit of Rick D. Kallas In Support of Motion For Emergency Hearing by the method indicated below and addressed to the following:

E. Scott Harmon
Law Offices of Harmon, Whittier & Day
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-7563

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile


Tiffany Llanos

EXHIBIT A

ELLSWORTH, KALLAS, TALBOY & DeFRANCO, P.L.L.C.

ATTORNEYS AT LAW

COPY

Robert W. Talboy

John C. DeFranco

Joseph L. Ellsworth

Rick D. Kallas*

* Licensed in Idaho and Oregon

May 8, 2008

Workers' Compensation Claims Manager

Liberty Northwest Insurance

6213 North Cloverdale Rd., Suite 150

P.O. Box 7507

Boise, ID 83707-1507

Re: (1) Notice of Legal Representation / No Contact Instruction
(2) Notice of Manifestation of Lumbar Spine Occupational Disease
(3) Claim For Worker's Compensation Benefits

Claimant: Robert A. Watson
Employer: Joslin Millwork, Inc.
Date of Manifestation of O/D: May 8, 2008
Liberty Claim #: Undetermined at this time

Dear Workers' Compensation Claims Manager:

(A) INTRODUCTION

Please be advised that Robert Watson has retained me to represent him in the above-referenced lumbar spine occupational disease claim. From this date forward, no employee, agent or representative of employer / surety is authorized to make direct or indirect contact with Mr. Watson about any disputed issue in his worker's compensation claim without my prior written authorization. All future written and oral communications regarding this claim must be delivered to me on Mr. Watson's behalf.

(B) NOTICE OF MANIFESTATION OF LUMBAR SPINE OCCUPATIONAL DISEASE

Transmitted / enclosed herewith as part of **Exhibit 1**, please find Dr. Frizzell's May 5, 2008 letter to me which I received on May 8, 2008. In his May 5, 2008 letter, Dr. Frizzell confirmed that Mr. Watson has contracted / incurred a lumbar spine occupational disease at L5-S1 which arose out of and in the course of his employment with your insured, Joslin Millwork, Inc. Mr. Watson's lumbar spine disease became manifest on May 8, 2008 when Mr. Watson received Dr. Frizzell's May 5, 2008 letter informing him that he has an occupational disease caused by his employment with Joslin Millwork, Inc.

With this letter, employer / surety are being provided with the following information:

Exhibit 1: Dr. Frizzell's medical records
(dates of service: 3/4/08 – 5/5/08 – 5 pages)

Exhibit 2: My April 29, 2008 letter to Dr. Frizzell (4 pages)

Exhibit A: Claimant's Job Description (1 page)
Exhibit B: Medical Records of Miles E. Ranck, D.C. (6 pages)
Exhibit C: Medical Records of James Bates, M.D. (12 pages)
Exhibit D: Statement From Claimant's Supervisor (1 page)

Exhibit 3: St. Lukes Regional Medical Center Records (6 pages)

This letter is being served on employer, surety and the Industrial Commission and *shall constitute written notice of the manifestation of Mr. Watson's occupational disease* pursuant to Idaho Code §72-448.

(C) CLAIM FOR MEDICAL BENEFITS

In his March 6, 2008 letter to Physiatrist, James H. Bates, M.D., Dr. Frizzell indicated that Mr. Watson has exhausted conservative treatment modalities and needs to undergo an L5-S1 microdiscectomy (See Exhibit 1).

In his April 12, 2008 History & Physical from St. Lukes RMC, Dr. Frizzell indicated that Mr. Watson has exhausted conservative measures and needs to undergo a "lumbar microdiscectomy on the left [at] L5-S1" (See Exhibit 3).

This letter constitutes Mr. Watson's claim for medical benefits in the form of the L5-S1 microdiscectomy that Dr. Frizzell has recommended.

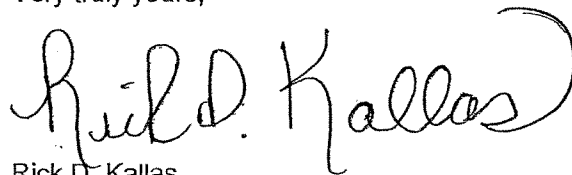
(D) CLAIM FOR TEMPORARY DISABILITY BENEFITS

Mr. Watson has been totally and temporarily disabled from work secondary to his L5-S1 disc herniation since February 27, 2008. After surgery, Mr. Watson will be totally disabled from work during his period of recovery and entitled to collect TTD benefits. Please initiate the payment of TTD benefits as soon as possible and continue making TTD benefits every 2 weeks until Mr. Watson reaches MMI from his back surgery and employer / surety receive his final PPI rating.

(E) REQUEST FOR EXPEDITED REVIEW & DECISION

Mr. Watson and his employer are extremely anxious to get his back fixed as soon as possible so that he can return to gainful employment. Please complete your analysis of the information in this letter and the accompanying Exhibits 1 – 3 and then authorize the surgery recommended by Dr. Frizzell as soon as possible. If you need supplemental information to complete your analysis of this claim, please contact me immediately with a request for specific information and I will exercise my best efforts to obtain the missing information for you. Thank you in advance for your prompt attention to this matter.

Very truly yours,



Rick D. Kallas
Attorney at Law

c.c. Client
Employer: Joslin Millwork, Inc. at 6467 Supply Way, Boise, ID 83716
Industrial Commission at P.O. Box 83720, Boise, ID 83720-0041

EXHIBIT 1

ROY TYLER FRIZZELL, M.D., F.A.D.

Certified American Board of Neurological Surgery

222 N. 2nd Street, Suite 307

Boise, Idaho 83702

(208) 344-1000 • Fax: (208) 344-1331

May 5, 2008

Rick D. Kallas
Attorney at Law
1031 E. Park Blvd.
Boise, ID 83712

Re: Robert Watson
DOB: [REDACTED]

Dear Mr. Kallas:

Thank you for your letter dated April 29, 2008, regarding Mr. Robert Watson.

1. Do I believe that Mr. Watson's findings of his 1/23/08 lumbar spine MRI show that he is afflicted by a lumbar spine occupational disease?

Yes.

2. After reading Mr. Watson's description of his job duties at Joslin Millwork, Inc., in Exhibit A, do I believe that the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which he was engaged at Joslin Millwork, Inc.?

Yes.

3. Since Mr. Watson started his job at Joslin Millwork, Inc., on or about September, 2005, and continued working in a very physically demanding job until just recently, do I believe that he was exposed to the hazards of such disease for a period of 60 days with the same employer?

Yes.

4. In my opinion, do I believe that Mr. Watson's disease was incurred in or arose out of and in the course of his employment with Joslin Millwork, Inc.?

Yes.

5. Do I believe that as a consequence of such disease Mr. Watson has become actually and totally incapacitated from performing his work as a sawyer for Joslin Millwork, Inc. (i.e., incapacitated from performing the last occupation in which he was injuriously exposed to the hazards of such disease)?

Yes.

Page Two
Ltr. to Rick D. Kallas, Attorney at Law
Re: Robert Watson
5/5/08

These responses are on a more likely than not medical basis.

Mr. Kallas, please contact me should you have further questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. Tyler Frizzell".

R. Tyler Frizzell, M.D., Ph.D.

R.TF/egs

ROY TYLER FRIZZELL, M.D., Ph.D.

Certified American Board of Neurological Surgery

222 N. 2nd Street, Suite 307
Boise, Idaho 83702
(208) 344-1000 • Fax: (208) 344-1331

March 6, 2008

James H. Bates, M.D.
2020 S. Eagle Rd.
Meridian, ID 83642

Re: **Robert Watson**
DOB: [REDACTED]

Dear Jim:

I had the pleasure of seeing Mr. Watson in clinic for his left sciatica. It started about three months ago without traumatic incident. It did not improve, so he subsequently went to a chiropractor and then underwent treatment with you.

He had an epidural steroid injection which actually made things worse. He notes pain mainly in the left buttock, and he initially had some radiation down to the knee which has improved. He notes no numbness or weakness. He has trouble straightening out the left leg. His pain is 7-8 on a scale of 10.

MRI shows a free fragment disc herniation on the left at L5-S1.

PAST MED. HISTORY: He has otherwise been in good health. He takes hydrocodone. He has no known allergies. He has had no prior surgeries. He is a nonsmoker and nondrinker.

SOCIAL HISTORY: He works as a cabinet builder. He is married with a 3-year-old child.

GEN. PHYS. EXAM:

Shows a pleasant gentleman in no acute distress.

CHEST: Clear.

HEART: Reg. rate and rhythm.

LOW BACK: Minimal lumbosacral tenderness.

NEURO:

He is awake and alert.

MOTOR: 5/5 strength.

SENSORY: Normal.

REFLEXES: Normal, including the left ankle.

GAIT: Antalgic to the left.

STRAIGHT LEG RAISE: Positive to 15 degrees.

Page Two

Ltr. to James H. Bates, M.D.

Re: Robert Watson

3/6/08

Jim, at this point I think Robert has about exhausted conservative measures. We discussed further conservative treatment and a lumbar microdiscectomy. We went over the procedure and the risks including but not limited to infection, CSF leak, pain, paralysis, bleeding, and need for more surgery. We talked about the hospitalization and the overall slow recovery from surgery.

Mr. Watson is going to look over his calendar and get back in touch with our office. Again, I appreciate you sending him my way.

Sincerely,

R. Tyler Frizzell, M.D., Ph.D.

R.TF/egs

MEDICAL HISTORY

Name Robert A. Watson

Date 3-4-68

What is the primary reason for your visit today? Herniated disk, piece broke off, pinching nerves down left buttocks & leg

Have you had any difficulty with: Check if applicable

- | | | | |
|---|---|--|--|
| <input type="checkbox"/> Memory or thinking | <input checked="" type="checkbox"/> Hearing | <input type="checkbox"/> Numbness | <input type="checkbox"/> Blacking out |
| <input type="checkbox"/> Smell | <input type="checkbox"/> Speech | <input type="checkbox"/> Weakness | <input type="checkbox"/> Seizures |
| <input type="checkbox"/> Taste | <input type="checkbox"/> Coordination | <input checked="" type="checkbox"/> Pain | <input type="checkbox"/> Swallowing |
| <input type="checkbox"/> Vision | <input type="checkbox"/> Balance | <input type="checkbox"/> Headache | <input type="checkbox"/> Shortness of breath |
| <input type="checkbox"/> Recent weight loss | | | |

What medications do you take? Hydrocodone

Allergies none

Surgical Procedures (list approximate year) none

Hospitalization (list approximate year) none

Have you had a blood transfusion? ☐ Yes ☒ No Any reaction? _____

Do you smoke? ☐ Yes ☒ No Packs per day? _____

Alcohol ☐ Yes ☒ No Number of drinks per day or week? _____

Have you or members of your family had the following illness or problem? Check where appropriate

| | Your family | You | Your family | You | Your family |
|-------------------------------------|--------------------------|--|--------------------------|--|--------------------------|
| <input type="checkbox"/> Alcoholism | <input type="checkbox"/> | <input type="checkbox"/> Eczema, itching, rash | <input type="checkbox"/> | <input type="checkbox"/> Phlebitis | <input type="checkbox"/> |
| <input type="checkbox"/> Anemia | <input type="checkbox"/> | <input type="checkbox"/> Epilepsy | <input type="checkbox"/> | <input type="checkbox"/> Rheumatic fever | <input type="checkbox"/> |
| <input type="checkbox"/> Arthritis | <input type="checkbox"/> | <input type="checkbox"/> Glaucoma | <input type="checkbox"/> | <input type="checkbox"/> Stroke | <input type="checkbox"/> |
| <input type="checkbox"/> Asthma | <input type="checkbox"/> | <input type="checkbox"/> Heart disease | <input type="checkbox"/> | <input type="checkbox"/> Thyroid disease | <input type="checkbox"/> |
| <input type="checkbox"/> Cancer | <input type="checkbox"/> | <input type="checkbox"/> High blood pressure | <input type="checkbox"/> | <input type="checkbox"/> Ulcer in stomach | <input type="checkbox"/> |
| <input type="checkbox"/> Depression | <input type="checkbox"/> | <input type="checkbox"/> Kidney/bladder problem | <input type="checkbox"/> | <input type="checkbox"/> Uncontrolled bleeding | <input type="checkbox"/> |
| <input type="checkbox"/> Diabetes | <input type="checkbox"/> | <input type="checkbox"/> Lung disease/tuberculosis | <input type="checkbox"/> | | |
| <input type="checkbox"/> Drug Abuse | <input type="checkbox"/> | <input type="checkbox"/> Nervous break down/mental illness | <input type="checkbox"/> | | |

EXHIBIT 2

ELLSWORTH, KALLAS, TALBOY & DeFRANCO, P.L.L.C.

ATTORNEYS AT LAW

Joseph L. Ellsworth

Rick D. Kallas*

* Licensed in Idaho and Oregon

Robert W. Talboy

John C. DeFranco

April 29, 2008

Via Hand Delivery

R. Tyler Frizzell, M.D., Ph.D.

Neurological Surgeon

222 N. 2nd St., Suite 307

Boise, ID 83702

Re: Request For Answers to Five (5) Medical / Legal Questions

Claimant: Robert A. Watson

Employer: Joslin Millwork, Inc.

Surety: Liberty Northwest Insurance

Dear Dr. Frizzell:

(A) Introduction

Robert A. Watson has retained me to investigate the merit of prosecuting an occupational disease worker's compensation claim against his employer, Joslin Millwork, Inc. and its worker's compensation surety, Liberty Northwest Insurance. I cannot determine whether Mr. Watson has a compensable occupational disease claim without expert medical opinion that addresses the medical / legal issues in the case. Please review the information in this letter and the attached Exhibits and then answer each of my five (5) medical / legal questions based on a reasonable degree of medical probability; i.e., on a more likely than not basis. I have enclosed a signed medical records release authorizing you to share information with me regarding Mr. Watson's medical status.

(B) The Elements of Proof in an Occupational Disease Claim

I was the Claimant's attorney in an Occupational Disease claim in 2007 where the Industrial Commission found that my client's cervical spine disc protrusions, cervical radiculopathy and spondylosis at C5-6 and C6-7 were compensable occupational diseases caused by his performance of repetitive and forceful maneuvers as a powerlinesman in awkward positions with his arms extended overhead while looking up 8 – 12 hours per day. The Industrial Commission listed the elements in a compensable Occupational Disease claim as follows:

OCCUPATIONAL DISEASE. The Idaho Workers' Compensation Law defines an "occupational disease" as "a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment," Idaho Code § 72-102(22)(a). The Law further provides that "[w]hen an employee of an employer suffers an occupational disease and is thereby disabled from performing his work

in the last occupation in which he was injuriously exposed to the hazards of such disease, . . . and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his [or her] disablement as hereinafter limited, the employee, . . . shall be entitled to compensation." Idaho Code § 72-437.

"Disablement" means "the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease," and "disability means the state of being so incapacitated." Idaho Code § 72-102(22)(c). Idaho Code § 72-439 limits the liability of an employer for any compensation for an occupational disease to cases where (1) "such disease is actually incurred in the employer's employment," and (2) where "the employee was exposed to the hazard of such disease for a period of 60 days for the same employer."

Idaho Code § 72-439 further provides, that "[w]here compensation is payable for an occupational disease, the employer, or the surety on the risk for employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefor."

As such, **a claimant must demonstrate (1)** that he was afflicted by a disease; **(2)** that the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which he was engaged; **(3)** that he was exposed to the hazards of such disease for a period of 60 days with the same employer; **(4)** that the disease was incurred in, or arose out of and in the course of his employment, and **(5)** that as a consequence of such disease, he become actually and totally incapacitated from performing their work in the last occupation in which he was injuriously exposed to the hazards of such disease. In addition, a claimant ***must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability.*** Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Co., 96 Idaho 341, 528 P.2d 903 (1974).

Claimant asserts his cervical spine degeneration, to include disk protrusions and radiculopathy at C5-6 on the left (Employer 1) and C6-7 on the right (Employer 2), which he characterizes as distinct occupational diseases, were caused by performing repetitive and forceful maneuvers as a power linesperson in awkward positions with his arms extended overhead and while looking up. He described performing such activities eight to twelve hours per day, five to six days per week, over 18 or 19 years. His testimony regarding his job duties is un rebutted and credible. In addition, his testimony regarding the onset of symptoms (i.e., no accident/event) is also credible. Several physicians have provided medical opinions in this matter and the

Referee's further analysis of those opinions is set forth below. See Proctor v. Anderson & Wood Construction Company, Inc., (employer) and American Casualty Company (surety) and Orius Corporation (employer) and Zurich American Insurance Company (surety), I.C. No. 01-022769 and I.C. No. 05-013965 (filed 5/4/07) (Referee Rainey Breen).

The Industrial Commission found that my client had met his burden of proving each of the 5 Occupational Disease elements listed above with the following language:

The Referee finds Claimant has proven his occupational disease claim against Employer 1. In 2001, Claimant sustained cervical spondylosis and radiculopathy at C5-6 on the left ***caused by continuous trauma to his neck and upper extremities while building power lines for Employer 1.*** Given the unique stress and strain placed on his neck and upper extremities by his particular job duties, the Referee finds ***the hazards of the condition actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which he was engaged. Such hazards included awkward positioning of the neck and arms while lifting, reaching, pulling and pushing with hand tools and equipment. Significant is the fact that most of Claimant's work was overhead and he was required to look up continuously for several hours each day while performing rigorous activity. This is certainly distinguishable from the general run of occupations.*** Claimant was exposed to the hazards of this cervical condition in excess of 60 days for Employer 1 and the condition was incurred during the course of that employment. Lastly, Claimant was actually and totally incapacitated from performing his work as a power linesperson. He could not get out of bed for two days, took one week off work, and was put in a left arm sling when he went to the hospital. Claimant has met the statutory requirements for compensability.

Proctor, supra, at p. 22.

(C) Applying the Facts of This Case to Occupational Disease Law

Mr. Watson began having problems with his low back in November of 2007. After treating with Chiropractic Physician, Miles E. Rank, D.C. and Physiatrist, James H. Bates, M.D., Mr. Watson had a lumbar spine MRI without contrast on January 23, 2008 which showed ... ***"a moderate sized left paracentral disk herniation at L5-S1 with an extruded fragment which may be a free fragment*** extending down into the left lateral recess dorsal to the S1 vertebral body resulting in ***severe left lateral recess stenosis*** and ***displacement of the traversing left S1 nerve root posteriorly***" (Source: 1/23/08 MRI from IMI).

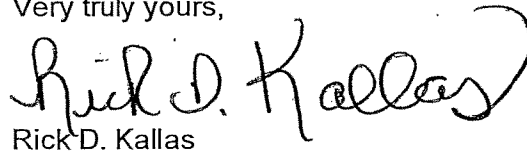
In your March 6, 2008 letter to Dr. Bates, you indicated that Mr. Watson had exhausted conservative treatment measures and you recommended that he undergo a lumbar microdiscectomy. In order to determine if Mr. Watson's L5-S1 microdiscectomy surgery would be covered through the worker's compensation system as an occupational disease claim, I must ask you to read Mr. Watson's description of his job duties as a Sawyer for Joslin Millwork, Inc., submitted herewith as ***EXHIBIT A*** and then answer each of the following questions based on a reasonable degree of medical probability:

Occupational Disease Questions

- (1) Do you believe that Mr. Watson's findings of his 1/23/08 lumbar spine MRI show that he is **afflicted by a lumbar spine occupational disease?**;
- (2) After reading Mr. Watson's description of his job duties for Joslin Millwork, Inc., in **EXHIBIT A**, do you believe that the **hazards** of such disease **actually exist, are characteristic of, and peculiar to** the trade, occupation, process, or employment in which he was engaged for Joslin Millwork, Inc.?
- (3) Since Mr. Watson started his job with Joslin Millwork, Inc., on or about September of 2005 and continued working in a very physically demanding job until just recently, do you believe that **he was exposed to the hazards of such disease for a period of 60 days** with the same employer?;
- (4) In your opinion, do you believe that Mr. Watson's **disease was incurred in, or arose out of and in the course of his employment** with Joslin Millwork, Inc.?; and,
- (5) Do you believe that as a consequence of such disease Mr. Watson has become **actually and totally incapacitated** from performing his work as a Sawyer for Joslin Millwork, Inc. (i.e., incapacitated from performing the last occupation in which he was injuriously exposed to the hazards of such disease?).

Please answer each of the 5 questions posed above based on a reasonable degree of medical probability; i.e., **on a more likely than not basis**. I have included Dr. Ranck's medical records as **EXHIBIT B**, Dr. Bates' medical records as **EXHIBIT C** and a statement from Mr. Watson's supervisor at Joslin Millwork, Inc., as **EXHIBIT D**. If you need any other information in order to answer these medical / legal questions, please advise. Thank you for your cooperation in this matter.

Very truly yours,


Rick D. Kallas

Enclosures
c.c. Robert Watson

ELLSWORTH, KALLAS, TALBOY & DeFRANCO, P.L.L.C.

ATTORNEYS AT LAW

Joseph L. Ellsworth
Rick D. Kallas*

* Licensed in Idaho and Oregon

Robert W. Talboy
John C. DeFranco

MEDICAL RECORDS RELEASE

Patient's Name: Robert A. Watson
SSN: [REDACTED]
Date of Birth: [REDACTED]
Address: 1912 W. Tendoy Dr.
Boise, Idaho 83705
Telephone #: (208) 703-7952

This document authorizes the recipient to release all medical records and/or other related information regarding the above individual to:

Rick D. Kallas
Attorney at Law
1031 E. Park Blvd.
Boise, Idaho 83712

This Release includes, but is not limited to, information relating to alcohol, drug abuse and/or mental health records obtained in the course of diagnosis and/or treatment. This Release conforms with section 408 of the Drug Abuse Office and Treatment Act of 1972 and the regulations promulgated thereunder, and records will be maintained in conformance with federal confidentiality regulations.

The reason for this release is that a claim has been made concerning personal injuries allegedly sustained by the above named individual. This release is valid until further notice unless revoked in writing. A photocopy of this Release may be used in lieu of the original.

Dated this 29th day of April, 2008.

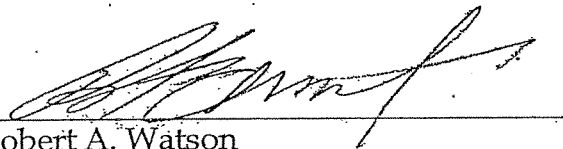

Robert A. Watson

EXHIBIT A

Description of Sawyer's Job Duties For Robert A. Watson

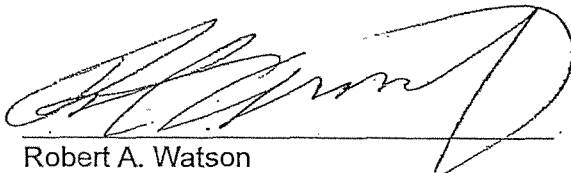
Employer: Joslin Millwork, Inc.
Date of Hire: September 2005
Job Title: Sawyer / Assembler

My name is Robert A. Watson. I started working for Joslin Millwork, Inc., in September of 2005. In mid-2006, I began working as a Sawyer on the production floor. As a Sawyer, my job requires me to perform the following physical movements with my body:

Lifting / Carrying of 4 X 8 Laminated Panels of Laminated Particle Board

I use the forklift on the production floor to pick up a pallet / unit of laminated particle board (approximately 34 sheets) and move it into position near the beam saw. After placing the pallet / unit on the floor with the forklift, I have to physically reach out away from my body with both hands / arms and grab each individual 4 X 8 sheet off of the stacked pallet / unit. Each sheet weighs approximately 150 pounds. After I grab and lift the sheet, I have to twist and turn my body around approximately 180 degrees and then maneuver the sheet onto the saw and place it in the proper cutting position. I then perform cuts to specifications with the saw. After the product has been cut to specification, I will manually pick up each cut sheet and stack the individual cut sheets into a stack on the fall-off table which is attached to the saw. After I stack 4-6 individual cut pieces, I then manually grab the entire stack, lift it, turn and carry it approximately 15 - 20 feet where I place it on a parts' cart. The cart has 2 shelves. The upper shelf is approximately 40 inches off of the ground and the lower shelf is approximately 10 inches off of the ground. When I slide the cut pieces into the shelves, I bend and twist at the waist in order to manipulate and position the cut product. In order to place the cut product on the lower shelf, I have to bend all the way down almost to the floor and then bend over at the waist and slide the product onto the lower shelf by pushing with both arms outstretched away from my body. Most of the time, I have to stretch my leg out and place my right foot behind the wheel on the cart in order to prevent it from moving or slipping away during the shelving process. During a standard 8.0 hour work shift, I will lift, carry, twist, turn, bend at the waist, push and pull these laminate sheets approximately 6 out of every 8 hours or 75% to 80% of the time. As part of the production cycle, I am required to perform these physical movements repeatedly at a very fast pace (i.e., as fast as the saw will cut the product and as fast as I can move my body while lifting and carrying these heavy sheets of laminate).

Dated this 15th day of April, 2008.



Robert A. Watson

EXHIBIT B

CONFIDENTIAL PATIENT CASE HISTORY

Please complete this questionnaire. This confidential history will be part of your permanent records.
THANK YOU.

Name Robert A. Watson Birthday [REDACTED] Sex ☒ M ☐ F
Address 1912 W. Tondoy Dr. City Boise Zip ID
Soc. Sec. [REDACTED] Home Phone NA Work Phone NA Cell 353-2883
Marital Status: ☒ M ☐ S ☐ D ☐ W Children, Ages 3 Spouse's Name Stacy
Occupation Cabinet Builder Employer Joslin Millwork Inc.
Who referred you to us? _____ How else did you hear about us? _____
What is your major complaint? cramping from (1) buttox and knee

How long have you had this condition? 3 + weeks
Have you had this or similar conditions in the past? no
Do any positions make it feel worse? sitting
Do any positions make it feel better? lying down
Is this condition: ☐ Improved ☐ Unchanged ☒ Getting Worse
Is this condition interfering with your: ☒ Work ☒ Sleep ☒ Daily Routine Other _____
Other doctors or therapist who have treated THIS condition no
What do you think caused this condition? physical labor
List surgical operations and years: none

Do you have a family physician? Name no
Medications, dosage and frequency: none

Have you been in an auto accident or had any other personal injury? ☐ Y ☒ N Describe _____

Signature [Signature] Date 12-12-07
Parent/Guardian _____ Date _____

Patient Name _____ Number _____ Date _____ 1

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① Leg Piv. Lateral → Tight And Very Sore SI, R(P) At 90° 38

FAMILY HISTORY List any of the diseases listed above which run in your family.

| Relative | Age if Living | Age at Death | Cause of Death | State of Health | Illnesses |
|----------------------|---------------|--------------|----------------|-----------------|-----------|
| Father | | | | | |
| Mother | | | | | |
| Brother(s) | | | | | |
| Sister(s) | | | | | |
| Maternal Grandfather | | | | | |
| Maternal Grandmother | | | | | |
| Paternal Grandfather | | | | | |
| Paternal Grandmother | | | | | |

SOCIAL HISTORY Check the boxes and fill in.

Current Weight 215 Have you recently lost or gained weight? gained

Mental Work ☐ Heavy ☒ Moderate ☐ Light Hours per day 8

Physical Work ☒ Heavy ☐ Moderate ☐ Light Hours per day 8

Exercise ☐ Heavy ☒ Moderate ☐ Light Hours per week 2 Type _____

Smoking ☐ Current ☐ Previous Packs/Day _____ No. of years _____

Alcohol Beer/Week 12 Liquor/Week _____ Wine/Week _____ No. of Years 5

Caffeine (Coffee, Tea, Cola) Cups/Day 2 No. of Years 7

Aspirin No./Day _____ No. of Years _____ Others _____

MARK THE AREAS OF YOUR SYMPTOMS ON THE FIGURE TO THE RIGHT. Use the following symbols:

Aches ^^^^ Numbness oooo Pins/Needles Stabbing ////

MARK AN "X" ON THE LINES:

How bad are your symptoms now?

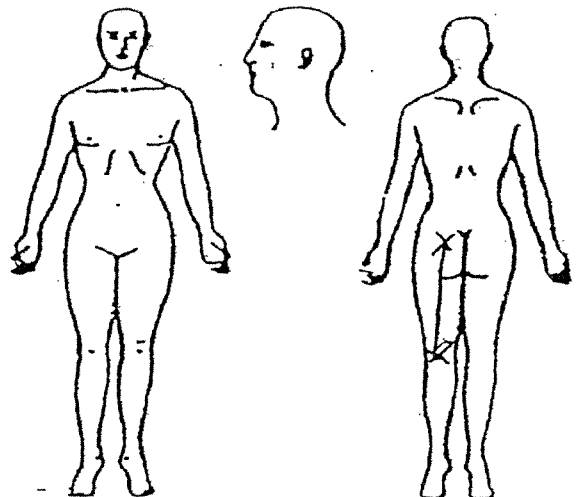
None

Most Severe

How bad have they been in the past?

None

Most Severe



Patient Name _____

Number _____

Date _____

4

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NEUROLOGIC NOW PAST

Seizures ☐ ☐
 Vertigo ☐ ☐
 Dizziness ☐ ☐
 Hand Trembling ☐ ☐
 Loss of Sensation ☐ ☐
 Incoordination ☐ ☐
 Loss of Facial ☐ ☐
 Weak Grip ☐ ☐
 Paralysis ☐ ☐
 Difficulty Speech ☐ ☐
 Tingling ☐ ☐
 Loss of Memory ☐ ☐
 Numbness ☐ ☐

ENDOCRINE

Weight Loss ☐ ☐
 Weight Gain ☐ ☐
 Extremely Thin ☐ ☐
 Heat Intolerance ☐ ☐
 Cold Intolerance ☐ ☐
 Hair Changes ☐ ☐
 Breast Changes ☐ ☐

IMMUNIZATION/VACCINATION

DPT ☐
 Mumps ☐
 Smallpox ☐
 Typhoid ☐
 Tetanus ☐
 Measles ☐
 Pneumococcal ☐
 Influenza ☐
 Polio ☐
 MMR ☐

BLOOD TYPE

A+ ☐ A- ☐
 B+ ☐ B- ☐
 AB+ ☐ AB- ☐
 O+ ☒ O- ☐
 Other _____

BLOOD TRANSFUSIONS

Date _____

Date _____

Date _____

Date _____

PSYCHIATRIC NOW PAST

Hyperventilation ☐ ☐
 Insecurity ☐ ☐
 Depression ☐ ☐
 Troubled Sleep ☐ ☐
 Irritable ☐ ☐
 Undecidedness ☐ ☐
 Timid ☐ ☐
 Hallucinations ☐ ☐
 Loss of Memory ☐ ☐
 Alcoholism ☐ ☐
 Drug Addiction ☐ ☐
 Drug Dependent ☐ ☐
 Suicidal Thoughts ☐ ☐
 Extreme Worry ☐ ☐
 Sexual Problems ☐ ☐

PAST MEDICAL HISTORY. Check only the ones you have had in the past.

Hay Fever ☐
 Mumps ☐
 Rheumatic Fever ☐
 Allergies ☐
 Angina ☐
 Cancer ☐
 Tumor ☐
 Blood Disease ☐
 Leukemia ☐
 Heart Trouble ☐
 Varicose Veins ☐
 Phlebitis ☐
 Hypertension ☐
 Stroke ☐
 Ulcers ☐
 Jaundice ☐
 Skin Trouble ☐
 Gallstones ☐
 Liver Trouble ☐
 Hepatitis ☐
 Parasites ☐

MUSCULOSKELETAL NOW PAST

Muscle Pain ☐ ☐
 Muscle Weakness ☐ ☐
 Muscle Cramps ☒ ☐
 Muscle Twitching ☐ ☐
 Joint Stiffness ☐ ☐
 Joint Pain ☐ ☐

Epilepsy ☐
 Paralysis ☐
 Polio ☐
 Mental Illness ☐
 Alcoholism ☐
 Depression ☐
 Nervous Breakdown ☐
 Migraine ☐
 Gout ☐
 Hemorrhoids ☐
 Prostate Problems ☐
 Sexual Problems ☐
 Gonorrhea ☐
 Syphilis ☐
 Diabetes ☐
 Bladder Trouble ☐
 Kidney Stones ☐
 Kidney Infections ☐
 Diabetes ☐
 Bladder Trouble ☐
 Dysentery ☐

Date of Last Chest X-Ray _____ ☐ Normal ☐ AbnormalLast TB Skin Test _____ ☐ Normal ☐ Abnormal

Allergies: _____

Patient Name _____

Number _____

Date _____

3

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CONSULTATION/HISTORY

NAME Rob Watson DATE 12-12-07

What have you heard about chiropractic? _____

Major Complaints: low back pain @ side superior Butth
into @ leg and knee
(BPP) pain is sup. @ Butthocks to knee

At its' worst, what is the level of pain (1-10)? 10

When first noticed this? 1 month ago

How long have you had this problem? 1 How many times have you had this problem? Constant

Earlier accident/injury or condition that could have brought this about or be related to it? 7 All wide

Worse, better, A.M., P.M.? all time worse Any position relieves? NO

When its' at its' worst how does it feel? tight leg leg lock

Any radiation of pain into an extremity, (where)? leg to knee on @

What done for condition yourself - did it help? —

Anyone else in the family have same problem? —

Have you become discouraged about getting this problem handled? yes

If you were to compare a day with this problem at its' worst to a day without the problem.....

How does it interfere with your work? > All Aspects

How does it interfere with your home life? > All Aspects

How does it interfere with your hobbies? > All Aspects

How does it interfere with your social life? > All Aspects

How does this problem create stress for you? Worries it will worsen

What daily, routine activities make this problem worse? _____

What will happen in 5 years if this problem is left uncorrected? Worsen

Is getting rid of what caused this problem a priority for you? yes

On a scale of 1-10, ten being the highest, rate your commitment to getting rid of this problem 10

What would keep you from correcting this problem? _____

From this office do you want temporary relief only, or do you want it corrected as much as possible? _____

Do you have children? ☐ yes ☐ no

Names _____ Names _____

Ages _____ Ages _____

Do they have earaches, allergies, colds, headaches, other problems? _____

Cervical Spine

- 729.2 Brachial neuralgia
- 723.4 Brachial radiculitis
- 722.4 Cervical disc degeneration
- 722.6 Cervical disc degeneration/narrowing of disc height
- 724.9 Cervical facet syndrome
- 847.0 Cervical hyperflexion/hyperextension
- 737.8 Cervical hypolordosis with subs. jamming of the post. Articulating facets
- 729.1 Cervical myofascitis
- 724.9 Cervical nerve root compression
- 729.2 Cervical neuralgia
- 739.1 Cervical segmental dysfunction
- 723.5 Cervical torticollis
- 728.85 Deep and superficial muscle spasms
- 722.4 Degeneration of cervical intervertebral disc
- 724.8 Facet syndrome
- 737.8 Reversal of normal cervical curve

Thoracic Spine

- 848.2 Chondrosternal joint sprain/strain-thoracic
- 848.3 Chondrocostal joint sprain/strain-thoracic
- 724.4 Intercostal neuritis
- 848.3 Rib sprain/strain thoracic
- 724.1 Thoracalgia
- 728.85 Thoracic muscle spasms
- 729.1 Thoracic myofascitis
- 847.1 Thoracic sprain/strain

Lumbar Spine

- ~~728.4~~ Ligament laxity
- 724.2 Low back pain/lumbalgia
- 722.52 Lumbar disc degeneration
- 847.2 Lumbar hyperflexion/hyperextension
- 728.4 Lumbar ligament instability
- 728.85 Lumbar muscle spasm
- 953.2 Lumbar nerve root injury
- 724.4 Lumbar radiculitis
- 738.4 Lumbar spondylolithesis
- 847.2 Lumbar sprain/strain
- 739.3 Lumbosacral segmental dysfunction
- 846.0 Lumbosacral sprain/strain
- 739.4 Sacroiliac segmental dysfunction
- 846.1 Sacroiliac sprain/strain
- 720.2 Sacroiliitis
- ~~355~~ Sciatica (no disc)
- 722.1 Sciatica (with disc)
- 724.79 Coccygodynia

Elbow/Wrist

- 726.33 Elbow bursitis
- 726.32 Elbow epicondylitis
- 729.2 Elbow neuritis
- 841.0 Elbow strain/sprain
- 959.3 Wrist injury
- 842.0 Wrist sprain/strain
- 833.5 Metacarpal joint sprain/strain

Shoulder

- 726.0 Shoulder adhesive capsulitis
- 726.12 shoulder bicipital tenosynovitis
- 326.10 shoulder bursitis
- 729.2 Shoulder neuralgia
- 719.41 Shoulder pain
- 726.10 Shoulder rotator cuff injury
- 840.0 Shoulder sprain/strain

Hip

- 729.2 Hip neuralgia
- 729.2 Hip neuritis
- 719.45 Hip pain

Knee/Ankle/foot

- 716.97 Ankle inflammation
- 959.47 Ankle injury
- 719.47 Ankle pain
- 845.1 Ankle sprain/strain
- 726.6 Knee bursitis
- 715.16 Knee Osteoarthritis
- 844.9 Knee sprain/strain
- 728.71 Plantar fascitis

General

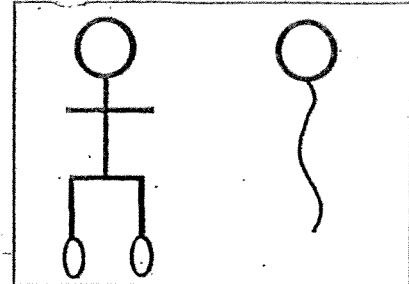
- 736.81 Acquired unequal leg length
- 351.0 Bell's Palsy
- 851.8 Brain contusion
- 850.1 Concussion with brief LOC
- 850.2 Concussion without LOC
- 780.4 Dizziness
- 784.0 Headache-symptomatic
- 346.0 Migraine headache
- 787.0 Nausea
- 731.2 Osteoarthritis
- 382.0 Otitis Media
- 848.1 TMJ disorder
- 830.0 TMJ subluxation
- 524.6 TMJ disorder, unspecified

Name Robert A. Wall Age Sex Date of exam 12-12-01

| | |
|---------------|-------|
| Vitals | |
| BP | _____ |
| Pulse | _____ |
| Respir. | _____ |
| Height | _____ |
| Weight | _____ |

| | | |
|-------------------|-------|------------|
| Crvl ROM | | A/P |
| Flexion (45) | _____ | _____ |
| Extension (30) | _____ | _____ |
| (R) lat flex (40) | _____ | _____ |
| (L) lat flex (40) | _____ | _____ |
| (R) rot. (80) | _____ | _____ |
| (L) rot. (80) | _____ | _____ |

| | | |
|-------------------|-------|------------|
| Lmbr ROM | | A/P |
| Flexion (90) | _____ | _____ |
| Extension (30) | _____ | _____ |
| (R) lat flex (20) | _____ | _____ |
| (L) lat flex (20) | _____ | _____ |
| (R) rot. (30) | _____ | _____ |
| (L) rot. (30) | _____ | _____ |



| | |
|----|--|
| C1 | |
| C2 | |
| C3 | |
| C4 | |
| C5 | |
| C6 | |
| C7 | |
| T1 | |
| T2 | |
| T3 | |
| T4 | |
| T5 | |
| T6 | |
| T7 | |
| T8 | |
| T9 | |
| 10 | |
| 11 | |
| 12 | |
| L1 | |
| L2 | |
| L3 | |
| L4 | |
| L5 | |
| S1 | |

| | | |
|-----------------------|-------|--|
| Cranial Nerves | | |
| I. | VII. | |
| II. | VIII. | |
| III. | IX. | |
| IV. | X. | |
| V. | XI. | |
| VI. | XII. | |

| | |
|--------------------|-------|
| Orthopedics | |
| George | - R L |
| Valsalva | - R L |
| F. Comp | - R L |
| Cx Distraction | - R L |
| Shldr Depress | - R L |
| Adson | - R L |
| Becterew | - R L |
| Kemp | - R L |
| Murphy's Punch | - R L |
| Soto Hall | - R L |
| Bilat Raise/lower | - R L |
| SLR | - R L |
| Braggard | - R L |
| Nachlas | - R L |

| | |
|--------------------------|-------|
| Muscular Weakness | |
| N. flexors | - R L |
| N. extensors | - R L |
| Deltoid | - R L |
| Triceps | - R L |
| W. flexors | - R L |
| W. extensors | - R L |
| 2P pinch | - R L |
| 5P pinch | - R L |
| Psoas | - R L |
| Quads | - R L |
| Tib. anterior | - R L |
| F. flexors | - R L |
| Ext. Hallux | - R L |
| Sartorius | - R L |
| TFL | - R L |
| Gluteal | - R L |
| Hams | - R L |

| | |
|---------------------------|---|
| Posture & Gait | |
| Antalgic posture | <input checked="" type="checkbox"/> Normal <input type="checkbox"/> |
| Altered Gait | <input checked="" type="checkbox"/> Normal <input type="checkbox"/> |

| | |
|-------------------|----------|
| Dermatomes | |
| C5 - R L | L3 - R L |
| C6 - R L | L4 - R L |
| C7 - R L | L5 - R L |
| C8 - R L | S1 - R L |
| T1 - R L | |

| | |
|---------------------|--|
| Notes | |
| <u>Disorder</u> | |
| <u>Back and Leg</u> | |
| <u>Pain 1 month</u> | |
| <u>Duration</u> | |

| | |
|--------------|--|
| Notes | |
| | |
| | |
| | |

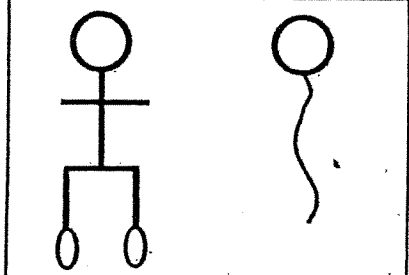
*Postural
pain plus
in legs
first time*

Name Age Sex Date of exam

| | |
|---------------|-------|
| Vitals | |
| BP | _____ |
| Pulse | _____ |
| Respir. | _____ |
| Height | _____ |
| Weight | _____ |

| | | |
|-------------------|-------|------------|
| Crvl ROM | | A/P |
| Flexion (45) | _____ | _____ |
| Extension (30) | _____ | _____ |
| (R) lat flex (40) | _____ | _____ |
| (L) lat flex (40) | _____ | _____ |
| (R) rot. (80) | _____ | _____ |
| (L) rot. (80) | _____ | _____ |

| | | |
|-------------------|-------|------------|
| Lmbr ROM | | A/P |
| Flexion (90) | _____ | _____ |
| Extension (30) | _____ | _____ |
| (R) lat flex (20) | _____ | _____ |
| (L) lat flex (20) | _____ | _____ |
| (R) rot. (30) | _____ | _____ |
| (L) rot. (30) | _____ | _____ |



| | |
|----|--|
| C1 | |
| C2 | |
| C3 | |
| C4 | |
| C5 | |
| C6 | |
| C7 | |
| T1 | |
| T2 | |
| T3 | |
| T4 | |
| T5 | |
| T6 | |
| T7 | |
| T8 | |
| T9 | |
| 10 | |
| 11 | |
| 12 | |
| L1 | |
| L2 | |
| L3 | |
| L4 | |
| L5 | |
| S1 | |

| | | |
|-----------------------|-------|--|
| Cranial Nerves | | |
| I. | VII. | |
| II. | VIII. | |
| III. | IX. | |
| IV. | X. | |
| V. | XI. | |
| VI. | XII. | |

| | |
|--------------------|-------|
| Orthopedics | |
| George | - R L |
| Valsalva | - R L |
| F. Comp | - R L |
| Cx Distraction | - R L |
| Shldr Depress | - R L |
| Adson | - R L |
| Becterew | - R L |
| Kemp | - R L |
| Murphy's Punch | - R L |
| Soto Hall | - R L |
| Bilat Raise/lower | - R L |
| SLR | - R L |
| Braggard | - R L |
| Nachlas | - R L |

| | |
|--------------------------|-------|
| Muscular Weakness | |
| N. flexors | - R L |
| N. extensors | - R L |
| Deltoid | - R L |
| Triceps | - R L |
| W. flexors | - R L |
| W. extensors | - R L |
| 2P pinch | - R L |
| 5P pinch | - R L |
| Psoas | - R L |
| Quads | - R L |
| Tib. anterior | - R L |
| F. flexors | - R L |
| Ext. Hallux | - R L |
| Sartorius | - R L |
| TFL | - R L |
| Gluteal | - R L |
| Hams | - R L |

| | |
|---------------------------|--|
| Posture & Gait | |
| Antalgic posture | <input type="checkbox"/> Normal <input type="checkbox"/> |
| Altered Gait | <input type="checkbox"/> Normal <input type="checkbox"/> |

| | |
|-------------------|----------|
| Dermatomes | |
| C5 - R L | L3 - R L |
| C6 - R L | L4 - R L |
| C7 - R L | L5 - R L |
| C8 - R L | S1 - R L |
| T1 - R L | |

| | |
|--------------|--|
| Notes | |
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| | | |
|------------|-------|-------|
| DTR | | |
| Biceps | _____ | _____ |
| Triceps | _____ | _____ |
| Patellar | _____ | _____ |
| Achilles | _____ | _____ |

| | |
|--------------|--|
| Notes | |
| | |
| | |
| | |

EXHIBIT C

ROBERT WATSON
1/17/2008
New Patient Clinic Visit

CHIEF COMPLAINT: Left buttock and leg pain.

HISTORY OF PRESENT ILLNESS: The patient is a 31-year-old male who reports that he began having pain in the left buttock and leg. Feels like a cramping sensation. Does not recall any specific injury to his leg, buttock or back.

Overall his best position is sitting with his leg bent. Worse position is walking. He works as a cabinet maker. He has maintained his working but still has difficulty with the leg.

He began seeing Dr. Ranck about a month ago. Had some improvement, kind of plateaued recently and now is here for evaluation.

He did go to an emergency room or urgent care and obtained some Flexeril and Darvocet for the pain.

He denies any previous significant back injury.

PAST MEDICAL HISTORY: Positive for deafness in the left ear since age 14.

SURGICAL HISTORY: None.

CURRENT MEDICATIONS: Aspirin, Flexeril and Darvocet.

ALLERGIES: NO KNOWN DRUG ALLERGIES.

REVIEW OF SYSTEMS: GENERAL: The patient reports some weight gain after stopping smoking. Otherwise a comprehensive review of systems is negative.

SOCIAL HISTORY: The patient is a nonsmoker. Some moderate alcohol use.

FAMILY HISTORY: Denies significant inheritable diseases.

PHYSICAL EXAMINATION:

GENERAL: A 31-year-old male. Appearance is appropriate for age. Awake, alert and oriented. Good historian. He is generally healthy in appearance.

VITAL SIGNS: Blood pressure 146/91, pulse 69, respirations 12.

GAIT/STATION: The patient stands in an upright position. Gait does not have full extension of the left leg during gait. He can walk on his toes and walk on his heels.

ROBERT WATSON

1/17/2008

New Patient Clinic Visit

.. Page 2 ..

The range of motion of the lumbosacral spine has moderate restriction in flexion and extension. Initially moderate to significant restriction in lateral tilt, moderate in rotation.

Shoulder height is symmetrical. There is a list to the right. Pelvic brim height is essentially symmetrical.

Motor strength is 5/5 in the hip flexion/extension, abduction/adduction, knee flexion/extension, ankle inversion/eversion, dorsiflexion, plantar flexion, and great toe extension.

Muscle stretch reflexes are 2/4 bilaterally patellas and ankles.

Babinski downward bilaterally. Sensory reported as normal bilaterally in the lower extremities. Equivocal straight leg raise exam on the left. Possible cross-straight leg but atypical in presentation.

Mechanical exam: Reduction of severity with extension in standing and extension in laying, as well as repeated extension in laying. Centralization with repeated extension in laying. Increase of pain with the flexion in standing and sitting.

IMPRESSION:

1. Back pain and radicular components. Posterior derangement.
2. Myofascial components. Muscle spasms in the gluteal region. Components of enthesitis.

PLAN & DISCUSSION:

1. Will refill Darvocet.
2. Medrol Dosepak.
3. Instructed the patient in extension in laying. Also reviewed stretches. Do mild hamstring stretches if he maintains a straight back and does not cause too much irritation in his movement.
4. Have the patient perform these activities as frequently as possible and will reevaluate within a week.

James H. Bates, M.D.

JHB/mao

t 1/21/2008

cc: Dr. Ranck

ROBERT A. WATSON

1/22/2008

Clinic Visit

PATIENT PROFILE: The patient is a 31-year-old male with back pain, radiculopathy and posterior derangement.

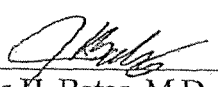
INTERVAL HISTORY & CHIEF COMPLAINT: The patient reports that he has had some improvement with the stretching and the cortisone, but still intermittent pain in the leg.

PHYSICAL EXAMINATION: The patient's overall comfort level appears to be improving some. Positive straight leg raise exam on the ^{right} is persisting. Muscle stretch reflexes 2/4 bilaterally. Increased peripheral symptoms with flexion in standing and diminished with extension in standing.

IMPRESSION: Back pain, radiculopathy and posterior derangement.

PLAN & DISCUSSION:

1. Will continue with extension in laying and standing. Have the patient increase this as much as possible.
2. Will proceed with an MRI of the lumbar spine.
3. The patient will be continuing with Dr. Ranck as he directs.
4. Will follow up in one week.


James H. Bates, M.D.

jhb:mao

t:1/24/2008

cc: Dr. Ranck



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C. E. Coffman, MD
C. H. Coulam, MD
I. C. Davey, MD
N. C. Davey, MD
V. Garabedian, MD
A. P. Giarque, MD
R. J. Gobel, MD
J. T. Hall, MD
J. A. Jackson, MD
J. Q. Knodt, MD

W. T. Murray, MD
D. D. Peck, MD
M. J. Ryan, MD
J. P. Salter, MD
L. M. Scales, MD
H. B. Schaff, MD
J. T. Seaborn, MD
C. D. Seborn, MD
B. J. Szumler, MD
W. L. Taylor, MD

Patient: WATSON, ROBERT A

EMPI #: 00490249

Visit #: 0802308049

DOB: [REDACTED]

MR #: 000411602

Add. Providers:

Hosp. Serv.: ZZA/Out

Room/Bed: /

P. Date: 1/23/2008 20:38

Exam #: 2177764

Ref. Provider: JAMES H. BATES*

Add. Provider:

Add. Provider:

Add. Provider:

PROCEDURE: MRI LUMBAR SPINE WITHOUT CONTRAST

INDICATIONS: Lumbar radiculopathy. Patient complains of left posterior leg pain extending from hip to the knee.

COMPARISON: AP and lateral views of the lower lumbar spine and sacrum dated December 12, 2007.

TECHNIQUE: Noncontrast sagittal and axial imaging was performed of the lumbar spine. Multiple different pulse sequences were utilized. Specific sequences and parameters are listed on DR systems.

FINDINGS:

GENERAL COMMENTS: Normal vertebral body height, alignment and marrow signal. Visualized paraspinal and retroperitoneal structures are unremarkable.

CONUS MEDULLARIS: Normal in morphology and signal characteristics. The conus is not low-lying.

LUMBAR DISK LEVELS:

L1-2: Normal for age.

L2-3: Normal for age.

L3-4: Normal for age.

L4-5: There is eccentric advanced left-sided facet arthropathy. There is normal disk space hydration and height. There is no central canal or neural foraminal stenosis.

L5-S1: There is a soft tissue mass compatible with extruded disk fragment extending down into the left lateral recess. There are portions of this which are not definitely contiguous with the parent disk. This disk extrusion measures approximately 14 mm cranial to caudal height x 9 mm anterior to posterior x 12 mm transverse dimension. The L5-S1 disk is desiccated and there is moderate loss of disk space height with broad based disk bulge. There is mild inferior neural foraminal stenosis on the left secondary to eccentric disk bulge and loss of disk space height. However, there is still preservation of fat around the exiting left L5 nerve root. The right neural foramen is patent. There is no central canal stenosis.

ADDITIONAL COMMENTS: None.

IMPRESSION: There is a moderate sized left paracentral disk herniation at L5-S1 with an extruded fragment which may be a free fragment extending down into the left lateral recess dorsal to the S1 vertebral body resulting in severe left lateral recess stenosis and displacement of the traversing left S1 nerve root posteriorly. There is no central canal stenosis.

Continued Report - Page 2 of 2

Patient: WATSON, ROBERT A

EMPI #: 00490249

Visit #: 0802308049

DOB: [REDACTED]

MR #: 000411602

Add. Providers:

Hosp. Serv.: ZZA/Out

Room/Bed: /

P. Date: 1/23/2008 20:38

Exam #: 2177764

Ref. Provider: JAMES H. BATES*

Add. Provider:

Add. Provider:

Add. Provider:

There is advanced degenerative disk disease at L5-S1 with mild left neural foraminal stenosis secondary to loss of disk space height and eccentric disk bulge.

There is moderate to severe left L4-5 and mild-moderate bilateral L5-S1 facet joint arthropathy.

72148

Dictated by: John A. Jackson, M.D. on 1/24/2008 at 9:24

Transcribed by: RYDELL on 1/24/2008 at 9:45

Approved by: John A. Jackson, M.D. on 1/24/2008 at 16:31

ROBERT A. WATSON
1/29/2008
Clinic Visit

PATIENT PROFILE: The patient is a 31-year-old male with back pain, radiculopathy and posterior derangement.

INTERVAL HISTORY & CHIEF COMPLAINT: The patient reports that he is doing about the same. He can tolerate the extension but it causes a knot right behind the knee. Decreases the rest of the leg pain somewhat with that position. He has not followed up with Dr. Ranck since the initial examination.

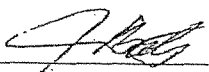
PHYSICAL EXAMINATION: The patient's comfort level overall is maintained. Positive straight leg raise exam on the left. Muscle stretch reflexes 2/4 patella, 2+/4 bilaterally in the ankles. Strength is maintained to manual testing, but single leg toe risers slight asymmetry. The patient can perform six to eight toe raises, but not full plantar flexion or raise.

The majority of the time was spent reviewing the MRI. There is a large disk herniation with free fragment at L5-S1 disk.

IMPRESSION: Back pain, radiculopathy and disk herniation.

PLAN & DISCUSSION:

- provide referral for JB*
1. Discussed options of treatment. Will ~~proceed with~~ an epidural injection and short course of mechanical diagnostic therapy.
 2. Follow up in 2 to 2 ½ weeks. If not considerable improvement, a surgical referral will then be appropriate for the patient.


James H. Bates, M.D.

jhb:mao
t:1/31/2008

cc: Dr. Ranck



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A. P. Giarque, MD
R. J. Grisel, MD
J. T. Hall, MD
J. A. Jackson, MD
J. Q. Knochel, MD

W. T. Murray, MD
D. D. Peck, MD
M. J. Ryan, MD
J. P. Salber, MD
L. M. Scates, MD
H. B. Schaff, MD
J. T. Seaborn, MD
C. D. Sebota, MD
B. J. Sennler, MD
W. L. Taylor, MD

Patient: WATSON, ROBERT A

EMPI #: 00490249

Visit #: 0803502178

DOB: [REDACTED]

MR #: 000411602

Add. Providers:

Hosp. Serv.: ZZA/Out

Room/Bed: /

P. Date: 2/04/2008 9:55

Exam #: 2184825

Ref. Provider: JAMES H. BATES*

Add. Provider:

Add. Provider:

Add. Provider:

PROCEDURE: SP FLUOROSCOPIC GUIDED TRANSLAMINAR EPIDURAL INJECTION OF STEROID LUMBAR OR SACRAL

INDICATIONS: Degenerated intravertebral disc at L5-S1 with left sided disc extrusion and left leg radiculopathy.

COMPARISON: Lumbar spine MR 1/23/08.

TECHNIQUE: The nature of the procedure, the possible benefits as well as potential risks, including but not limited to bleeding, infection, vascular injury, spinal cord or nerve injury leading to paralysis, and allergic contrast reaction were discussed with the patient. Informed written and verbal consent were given to proceed.

The patient was placed prone on the fluoroscopic table. Utilizing fluoroscopy as a guide, an appropriate skin site was marked, prepped and draped in the standard sterile fashion before being anesthetized with 1% buffered lidocaine. Under fluoroscopic guidance, a 22-gauge Thouy needle was advanced into the dorsal epidural space at the L5-S1 level. Approximately 1 cc nonionic contrast was instilled to confirm epidural location of the needle tip. Once this was confirmed, a solution of Celestone (6 mg betamethasone/cc) and 1% lidocaine was slowly injected into the dorsal epidural space under fluoroscopic visualization.

Patient tolerated the procedure well, and there were no immediate complications.

NEEDLE SPECS: 22-gauge Thouy needle.

LEVEL AND LOCATION: Left paramedian L5-S1.

LOCAL ANESTHESIA: 5 cc 1% buffered lidocaine.

SOLUTION INJECTED: 2 cc of Celestone (6 mg betamethasone/cc) and 5 cc 1% lidocaine.

ADDTL COMMENTS: The initial intent was to perform a translaminar epidural steroid injection from the left at L4-5. However, due to patient's variant anatomy, there is poor visualization of the left L4 lamina and the typical bony landmarks used for this injection were not present, therefore I elected to perform the injection of the L5-S1 level.

IMPRESSION: Fluoroscopic guided left L5-S1 epidural steroid injection performed as detailed above. Patient's preprocedural pain level was 6/10. Postprocedural pain level was 6-7/10.

Depending on the clinical response to this injection, after concurrently reviewing the

Continued Report - Page 2 of 2

Patient: WATSON, ROBERT A

EMPI #: 00490249

Visit #: 0803502178

DOB: [REDACTED]

MR #: 000411602

Add. Providers:

Hosp. Serv.: ZZA/Out

Room/Bed: /

P. Date: 2/04/2008 9:55

Exam #: 2184825

Ref. Provider: JAMES H. BATES*

Add. Provider:

Add. Provider:

Add. Provider:

lumbar spine MRI, it is noted that the patient may potentially benefit from a selective left S1 nerve root block as a future injection if radicular symptoms persist.

62311, 77003

Dictated by: John A. Jackson, M.D. on 2/04/2008 at 11:13

Approved by: John A. Jackson, M.D. on 2/04/2008 at 11:13

ROBERT WATSON

2/6/2008

Clinic Visit

PATIENT PROFILE: The patient is a 31-year-old male with back pain, radiculopathy, posterior derangement and free disk fragment.

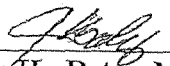
INTERVAL HISTORY & CHIEF COMPLAINT: The patient underwent epidural steroid injection. Reports increased back pain. The pain in the leg is more variable, ranging from more severe to at times less severe since the injection.

PHYSICAL EXAMINATION: The patient's comfort level appears to be diminished. Tightness in the left leg. Positive straight leg raise exam. Movement of extension in lateral shift seems to increase the pain behind the left knee.

IMPRESSION: Back pain with radiculopathy and disk herniation.

PLAN & DISCUSSION:

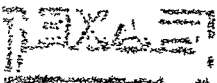
1. The patient will be seen later this week for one or two therapy visits to see if there is any hint of centralization.
2. Will facilitate surgical referral.


James H. Bates, M.D.

Jhb:mao

t:2/8/2008

cc: Dr. Ranck



ROBERT WATSON

2/13/2008

Clinic Visit

PATIENT PROFILE: The patient is a 31-year-old male with back pain, radiculopathy, posterior derangement and free disk fragment.


INTERVAL HISTORY & CHIEF COMPLAINT: The patient reports that he is noticing a change of the pain. He has had a couple of physical therapy visits. Slight centralization. There is increase in the gluteal pain. Reports that the Darvocet is not effective for pain control.

PHYSICAL EXAMINATION: The patient's comfort level is improved from the last exam. Positive straight leg raise exam on the left. Mildly positive crossed-leg straight leg raise exam for the right leg. Muscle stretch reflexes are 2/4 bilaterally at the ankles.

IMPRESSION: Back pain with radiculopathy and disk herniation.

PLAN & DISCUSSION:

1. Have the patient continue with the physical therapy. Will re-discuss the patient's case with Dr. Frizzell.
2. Will follow up in two weeks.
3. Prescription of Vicodin.


James H. Bates, M.D.

Jhb:mao
t:2/15/2008

cc: Dr. Ranck

ROBERT WATSON

2/27/2008

Clinic Visit

PATIENT PROFILE: The patient is a 31-year-old male with back pain, radiculopathy, posterior derangement, free fragment.

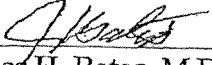
INTERVAL HISTORY & CHIEF COMPLAINT: The patient reports a slight improvement. He has had a couple of physical therapy visits. He is still having difficulty working, using some Vicodin for pain control. He has not had the surgical consultation yet.

PHYSICAL EXAMINATION: The patient's comfort level overall appears to be slightly improved. Still has a positive straight leg raise exam on the left. Muscle stretch reflexes preserved, 2/4 bilaterally patellas and ankles.

IMPRESSION: Back pain with radiculopathy, disk herniation and free fragment.

PLAN & DISCUSSION:

1. Will continue with physical therapy due to the slight improvement. Once again counseled with the patient in regards to surgical versus conservative management.
2. The patient will follow up with the surgical consultation and then return in approximately two weeks.


James H. Bates, M.D.

Jhb:mao

t:2/29/2008

cc: Dr. Ranck

ROBERT WATSON

3/14/2008

Clinic Visit

PATIENT PROFILE: The patient is a 31-year-old male with back pain, radiculopathy, posterior dérangement, free fragment.

INTERVAL HISTORY & CHIEF COMPLAINT: The patient reports that he is still having a lot of pain. He has had the surgical consultation and has thought about it and is getting ready to schedule for his surgery.

PHYSICAL EXAMINATION: The patient's comfort level has no significant change. Still slow in transitions.

The majority of the time was spent in evaluating the patient and counseling with him in regards to medication usage.

IMPRESSION:

1. Back pain with radiculopathy.
2. Disk herniation with free fragment.

PLAN & DISCUSSION:

1. Will provide Norco 1 to 1 ½ tablets q.6h. p.r.n.
2. The patient will follow up with Dr. Frizzell for surgery.



James H. Bates, M.D.

Jhb:mao

t:3/18/2008

cc: Dr. Frizzell
Dr. Ranck

EXHIBIT D

In regards to employee: Rob Watson

April 12, 2008

The following is the sequence of events regarding the employment history of Rob Watson as according to Brian Leisten.

Approximately three years ago Rob Watson was hired as a cabinet maker apprentice. Since that time he has been an excellent employee and has worked his way into an important role in the fabrication of commercial architectural millwork.

During the initial interview, Rob had made comments as to the physical demands of his previous work, installing drywall / sheetrock. He had experienced soreness in his elbow, shoulder and back due to the requirements of installing the sheetrock. He was looking to get into a different occupation.

As Rob began ~~his~~ to work on our production floor, he was a parts processor / assembler. Soon he was promoted to sawyer. He was in the mill cutting parts on a computerized beam saw. This job description requires him to manipulate 4 x 8 sheets of material for cutting, and once they are cut, he off loads onto carts for processing.

He is also a key delivery employee. His knowledge of careful loading, deliveries without damage and commercial job site savvy have made Rob our best delivery person. This does require lifting and staging fabricated goods in place for installation.

Near the end of 2007, Rob had asked for time off due to an increase in soreness in his back. In the past, on two occasions that I am aware of, he needed to have his back 'popped' by a chiropractor.

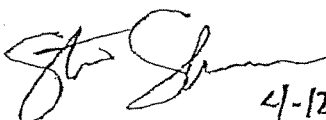
There has never been a specific incident to where an accident / injury report was submitted. I am not one to diagnose a medical condition and do not know if his condition is a:

1. Pre-existing condition that has escalated due to his current duties - or -
2. A condition that was inevitable no matter what the job description would have been or -
3. A condition caused by his job description at Joslin Millwork.

At this point in time, it is to my knowledge that Rob is in need of an operation. We look forward to the day he returns to work.

Sincerely,

Brian Leisten - Project Manager / Human Resources.
Steve Schneer - Production Supervisor


4-12-08

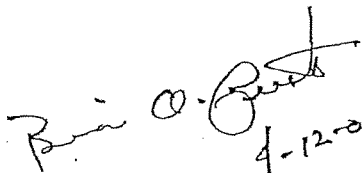

4-12-08

EXHIBIT 3

**HISTORY AND PHYSICAL**

R. Tyler Frizzell, M.D.

NAME: Watson, Robert A
ADM: 04/18/2008
DIS:

BILLING NUMBER:
MEDICAL RECORD NO.: 0569583
ROOM:
FACILITY: SLR **PT/SVC:** /

DATE OF BIRTH: 01/02/1977**DATE OF ADMISSION:** 04/18/2008

REASON FOR ADMISSION: The patient is a pleasant, young gentleman with intractable left sciatica, admitted for lumbar microdiscectomy on the left L5-S1.

HISTORY OF PRESENT ILLNESS: He has free fragment disk herniation. Symptoms began over three months ago. No history of trauma, no significant improvement with chiropractic care, or physiatry care. Epidural injections made symptoms worse. Pain radiates to the left buttock and down to the knee. No numbness or weakness but difficulty straightening out the left leg.

ALLERGIES: HE HAS NO ALLERGIES.

PAST SURGICAL HISTORY: No prior surgeries.

HABITS: Nonsmoker and nondrinker.

MEDICATIONS: He takes Vicodin.

SOCIAL HISTORY: He works as a cabinet builder. He is married with a 3-year-old child.

PHYSICAL EXAMINATION: **GENERAL:** A pleasant gentleman in no acute distress. **CHEST:** Clear. **HEART:** Regular rate. **MUSCULOSKELETAL:** Minimal lumbosacral tenderness. **NEUROLOGIC:** Awake and alert with 5/5 motor strength. Normal sensory exam. Normal reflexes. Antalgic gait to the left. Positive straight leg raise 15 degrees on the left.

ASSESSMENT/PLAN: At this point the patient appears to have exhausted conservative measures. We talked about different options. We talked about conservative options and surgery. We talked about risks of surgery include nerve damage, infection, spinal fluid leak, pain and need for more surgery. He would like to proceed.



HISTORY AND PHYSICAL

R. Tyler Frizzell, M.D.

NAME: Watson, Robert A

ADM: 04/18/2008

DIS:

BILLING NUMBER:

MEDICAL RECORD NO.: 0569583

ROOM:

FACILITY: SLR

PT/SVC: /

Signed: _____
R. Tyler Frizzell, M.D.

Date: _____ Time: _____

T: jcl 60

d: 03/29/2008 4:53 P

t: 03/29/2008 5:08 P

PhysInitials: RTF

Document # 3449890

Job # 000003837

cc: R. Tyler Frizzell, M.D.

SURGEON REQUEST CHECKLIST

| | |
|--|------------------------------|
| PHYSICIAN: <u>R. FENZELL</u> | ASSISTANT: |
| PROCEDURE: <u>left C5-51 Microdissection</u> | |
| PATIENT: <u>WATSON, ROBERT</u> | PATIENT AGE: <u>31</u> |
| TODAY'S DATE: | SURGERY DATE: <u>4/18/02</u> |

| | | |
|--|--|---|
| POSITION/APPROACH <input type="checkbox"/> SUPINE <input checked="" type="checkbox"/> PRONE <input type="checkbox"/> LATERAL <input type="checkbox"/> RIGHT ↑ <input type="checkbox"/> LEFT ↑ ANTERIOR/POSTERIOR (FLIP FLOP) <input type="checkbox"/> ANTERIOR 1 ST — 2 ND — <input type="checkbox"/> POSTERIOR 1 ST — 2 ND — <input type="checkbox"/> THOROSCOPIC <input type="checkbox"/> ABDOMINAL <input type="checkbox"/> THORACIC <input type="checkbox"/> REVERSE BED | TABLE <input type="checkbox"/> TOWER <input checked="" type="checkbox"/> ELECTRIC BED <input type="checkbox"/> VELCRO FRAME <input checked="" type="checkbox"/> WILSON FRAME <input type="checkbox"/> OSI - JACKSON FRAME <input type="checkbox"/> OSI - FLAT TOP <input type="checkbox"/> BARIATRIC BED | FUSION <input type="checkbox"/> AUTOGRAFT <input type="checkbox"/> ALLOGRAFT <input type="checkbox"/> HEALOS <input type="checkbox"/> SYMPHONY <input type="checkbox"/> TISSEEL |
| PATIENT MONITORING <input type="checkbox"/> FOLEY <input type="checkbox"/> ARTERIAL LINE <input type="checkbox"/> CVP <input type="checkbox"/> FIBEROPTIC INTUBATION | | |

| | | |
|--|--|--|
| X-RAY <input checked="" type="checkbox"/> C-ARM <input type="checkbox"/> FLAT PLATES OTHER <input type="checkbox"/> EEG <input type="checkbox"/> CELL SAVER <input type="checkbox"/> ULTRASOUND <input type="checkbox"/> ULTRASONIC ASPIRATOR <input type="checkbox"/> VIDEO | EQUIPMENT MICROSCOPE <input checked="" type="checkbox"/> LEICA FIXATION <input type="checkbox"/> MAYFIELD SKULL PINS <input type="checkbox"/> GARDNER WELLS TRACTION <input type="checkbox"/> HORSESHOE <input type="checkbox"/> MAYFIELD OVERHEAD TABLE | POWER <u>Am8</u> <input checked="" type="checkbox"/> MIDAS REX BURRS <input type="checkbox"/> 4200 <input type="checkbox"/> TPS <input type="checkbox"/> COMMAND II <input type="checkbox"/> HUDSON BRACE <input type="checkbox"/> STRYKER CORE SYSTEM <input type="checkbox"/> SYSTEM 5 LASER <input type="checkbox"/> YAG <input type="checkbox"/> CO2 <input type="checkbox"/> HOLMIUM |
|--|--|--|

| | | |
|--|-----------------------------|---|
| INSTRUMENTS <input type="checkbox"/> ANEURYSM CLIPS <input type="checkbox"/> MICRO INSTRUMENTS <input type="checkbox"/> TRIMLINE RETRACTOR <input type="checkbox"/> MCCULLOUGH RETRACTOR <input type="checkbox"/> RHOTON DISSECTORS <input type="checkbox"/> THORACIC LAMI <input type="checkbox"/> RICHARDS RETRACTOR <input type="checkbox"/> REDMOND RETRACTOR <input type="checkbox"/> TRANSPHENOIDAL <input type="checkbox"/> PLIF SET <input type="checkbox"/> LUMBAR FUSION | | |
| CRANIOTOMY <input type="checkbox"/> RIGHT <input type="checkbox"/> LEFT <input type="checkbox"/> ANEURYSM <input type="checkbox"/> GLIADEL WAFER X <input type="checkbox"/> TUMOR <input type="checkbox"/> EDM VENTRICULAR CATH <input type="checkbox"/> SYNTHES RESORBABLE <input type="checkbox"/> CRANIOFIX <input type="checkbox"/> GREENBURG RETRACTOR | <u>ASIC</u> <u>Stacy</u> | V-P SHUNT NT _____ ATH _____ _____ _____ |

| | | |
|---|--|--|
| IMPLANTS <input type="checkbox"/> CORNERSTONE <input type="checkbox"/> DANEK ATLANTIS <input type="checkbox"/> DANEK AXIS <input type="checkbox"/> DANEK CROSS LINKS <input type="checkbox"/> DANEK M-8 (CD HORIZON) <input type="checkbox"/> DANEK M-10 (CD HORIZON) <input type="checkbox"/> DANEK VERTEX <input type="checkbox"/> DANEK ZEPHIR <input type="checkbox"/> DANEK PREMIER <input type="checkbox"/> SYNTHES CLIC-X <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> | | <input type="checkbox"/> DEPUY ACROMED COUGAR CAGES <input type="checkbox"/> DEPUY ACROMED MESH (HARMS CAGES) <input type="checkbox"/> DEPUY ACROMED MONARCH <input type="checkbox"/> DEPUY ACROMED MOSS MIAMI <input type="checkbox"/> DEPUY ACROMED SLIM LOC <input type="checkbox"/> DEPUY ACROMED SUMMIT <input type="checkbox"/> DEPUY ACROMED ISOLA <input type="checkbox"/> SYNTHES CERVICAL PLATE <input type="checkbox"/> GLOBUS CAGES <input type="checkbox"/> GLOBUS ASSURE PLATES <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> |
|---|--|--|

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PRE-ADMISSION ORDERS

Case # 636231

Pt Name: WATSON, ROBERT
(Last) (First)
Birth Date: 1/2/77 Phone: 703-7952
Diagnosis: 722.10
Admit Date: 4/18/08
Physician: R. TYLER RIZZEL
Consulting Physician(s):
Pre-Test Date:

Expected Status

- ☐ Outpatient
☐ May need a bed
☒ Inpatient

Authorization # if available: _____

Anticipated LOS: _____

**See reverse side for Admission Categories

Location

- ☒ St. Luke's-Boise
Fax: 381-3060
☐ St. Luke's Surgery Center
Fax: 381-3209
☐ St. Luke's Meridian
Fax: 706-2178

Laboratory - **See reverse side for Lab References

- ☐ No Lab Required
☐ Urine Analysis (UA)
☐ Electrolytes
☒ Basic Metabolic
☐ Comprehensive Metabolic
☐ Renal Function
☐ Hepatic Function
☐ Hepatitis C Virus (HCV)
☐ HIV
☐ Prothrombin
☐ APTT
☐ Beta HCG Serum ☐ Qualitative ☐ Quantitative
☐ Beta HCG Urine
☒ CBC with auto differential/platelet count
☐ CBC with manual differential/platelet count
☐ Hemogram
☐ Hemoglobin/Hematocrit
☐ Glucose Screening (Bedside)
☐

Blood Bank - **See reverse side for Blood

Bank References

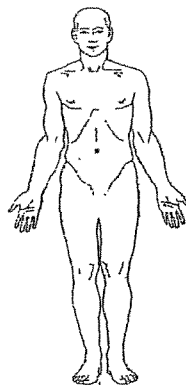
- ☐ Autologous ABO & Rh
☐ Pre-op type and screen
☐ Crossmatch # _____ units
☐ If + Ab screen, have patient return 24 hours
prior to surgery for re-draw.
☐

Cell Saver

VORDING FOR SURGERY CONSENT:

X-Ray

- ☐ Chest
☐ KUB
☐
☒ EKG
Activity _____
Diet _____
☐ Clip ☐ No Clip



Pneumatic Hose:

- ☒ Knee
☐ Thigh

Ted Hose:

- ☒ Knee
☐ Thigh

Anesthetic Requested

- ☐ Choice ☐ Spinal / Epidural
☐ General ☐ MAC
☐ Local ☐ Other

Post Op Analgesia Requested

(Medically Necessary):

- ☐ Epidural or Intrathecal Narcotic
☐ Femoral Nerve Block
☐ Interscalene Nerve Block
☐ Popliteal Nerve Block
☐ Other: _____

IV Pre-op Antibiotics (indicate dose)

PEDIATRIC

ADULT

- | PEDIATRIC | ADULT |
|---|---|
| <input type="checkbox"/> 25 mg/kg Cefazolin | <input type="checkbox"/> 1gm <input checked="" type="checkbox"/> 2 gm |
| <input type="checkbox"/> 40 mg/kg Cefoxitin | <input type="checkbox"/> 1gm <input type="checkbox"/> 2 gm |
| <input type="checkbox"/> 50 mg/kg Cefuroxime | <input type="checkbox"/> 1500 mg |
| <input type="checkbox"/> 10 mg/kg Clindamycin | <input type="checkbox"/> 900 mg |
| <input type="checkbox"/> 2.5 mg/kg Gentamicin | <input type="checkbox"/> 1.5 mg/kg <input type="checkbox"/> 120 mg |
| <input type="checkbox"/> 15 mg/kg Levofloxacin | <input type="checkbox"/> 500 mg |
| <input type="checkbox"/> 15 mg/kg Metronidazole | <input type="checkbox"/> 500 mg |
- Reserve for penicillin allergic patients or known / suspected MRSA
- ☐ 10 mg/kg Vancomycin ☐ 1000mg ☐ 1500mg

Weight _____ kg

LEFT L5-S1

MICRODISSECTION

| Date/Time | Progress Notes | Date/Time | Physician's Orders |
|-----------|--|-----------|---|
| 3/28 | <input type="checkbox"/> Risk, Benefits and Alternatives have been discussed with patient. | | <input type="checkbox"/> Foley Catheter in OR |
| 6 | ALLERGIES: <u>0</u> | | For Non-Anesthesia Procedure |
| | | | <input type="checkbox"/> Start IV |
| | | | <input type="checkbox"/> TKO <input type="checkbox"/> Heplock |
| | | | |
| | | | |

Physician's Signature

Date/Time: 3/28 6

DEPARTMENT OF PATHOLOGY
190 E. BANNOCK, BOISE, ID 83712

INP

WATSON, ROBERT A

DOB: [REDACTED] SEX: M
302877790 MR#: 569583

PHYSICIAN: 630

FRIZZELL, R. TYLER

222 N. 2ND ST. SUITE 307
BOISE, ID
83702

H28751

COLLECTED: 04/10/2008 11:50

CBC

| | | | |
|----------------|------|--------------|--------|
| WBC COUNT | 8.4 | [4.5-11.0] | K/UL |
| RBC COUNT | 5.03 | [4.30-5.90] | MIL/UL |
| HEMOGLOBIN | 15.8 | [13.9-16.3] | G/DL |
| HEMATOCRIT | 46.3 | [39.0-55.0] | * |
| MCV | 92.1 | [80.0-100.0] | FL |
| MCH | 31.4 | [25.0-35.0] | PG |
| MCHC | 34.1 | [31.0-37.0] | * |
| RDW-CV | 12.2 | [11.0-16.0] | FL |
| PLATELET COUNT | 326 | [130-350] | K/UL |
| MPV | 8.6 | [7-10] | FL |

AUTO DIFFERENTIAL

| | | | |
|--------------|-------|-------------|------|
| NEUTROPHIL % | 54 | [40-76] | % |
| LYMPHOCYTE % | 31 | [24-44] | % |
| MONOCYTE % | * 12 | [1.0-10.0] | % |
| EOSINOPHIL % | 2 | [0.0-3.0] | % |
| BASOPHIL % | 1 | [0.0-1.0] | % |
| NEUTROPHIL # | 4.6 | [1.90-8.80] | K/UL |
| LYMPHOCYTE # | 2.5 | [1.00-4.80] | K/UL |
| MONOCYTE # | * 1.0 | [0.10-0.80] | K/UL |
| EOSINOPHIL # | 0.1 | [0.00-0.50] | K/UL |
| BASOPHIL # | 0.1 | [0.00-0.10] | K/UL |

BASIC METABOLIC PANEL

| | | | |
|---------------|------|-------------|--------|
| SODIUM | 141 | [135-148] | MMOL/L |
| POTASSIUM | 3.9 | [3.5-5.5] | MMOL/L |
| CHLORIDE | 100 | [95-108] | MMOL/L |
| TOTAL CO2 | 30.1 | [21.0-32.0] | MMOL/L |
| GLUCOSE | 91 | [60-95] | MG/DL |
| BUN | 11 | [7-25] | MG/DL |
| CREATININE | 0.9 | [0.8-1.3] | MG/DL |
| GFR Estimated | >60 | [>60] | |

UNITS = ML/MIN/1.73m2

If patient is African-American, multiply result by 1.21.

| | | | |
|---------|-----|------------|-------|
| CALCIUM | 9.9 | [8.7-10.5] | MG/DL |
|---------|-----|------------|-------|

END OF REPORT

WATSON, ROBERT A
04/10/2008 16:10

PAGE 1

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WATSON, ROBERT A

ID:0569583

10-APR-2008 11:55:10

St Luke's Medical Center-PSC ROUTINE RECORD

02-JAN-1977(31-yr)
Male Caucasian

Room:8
Loc:204

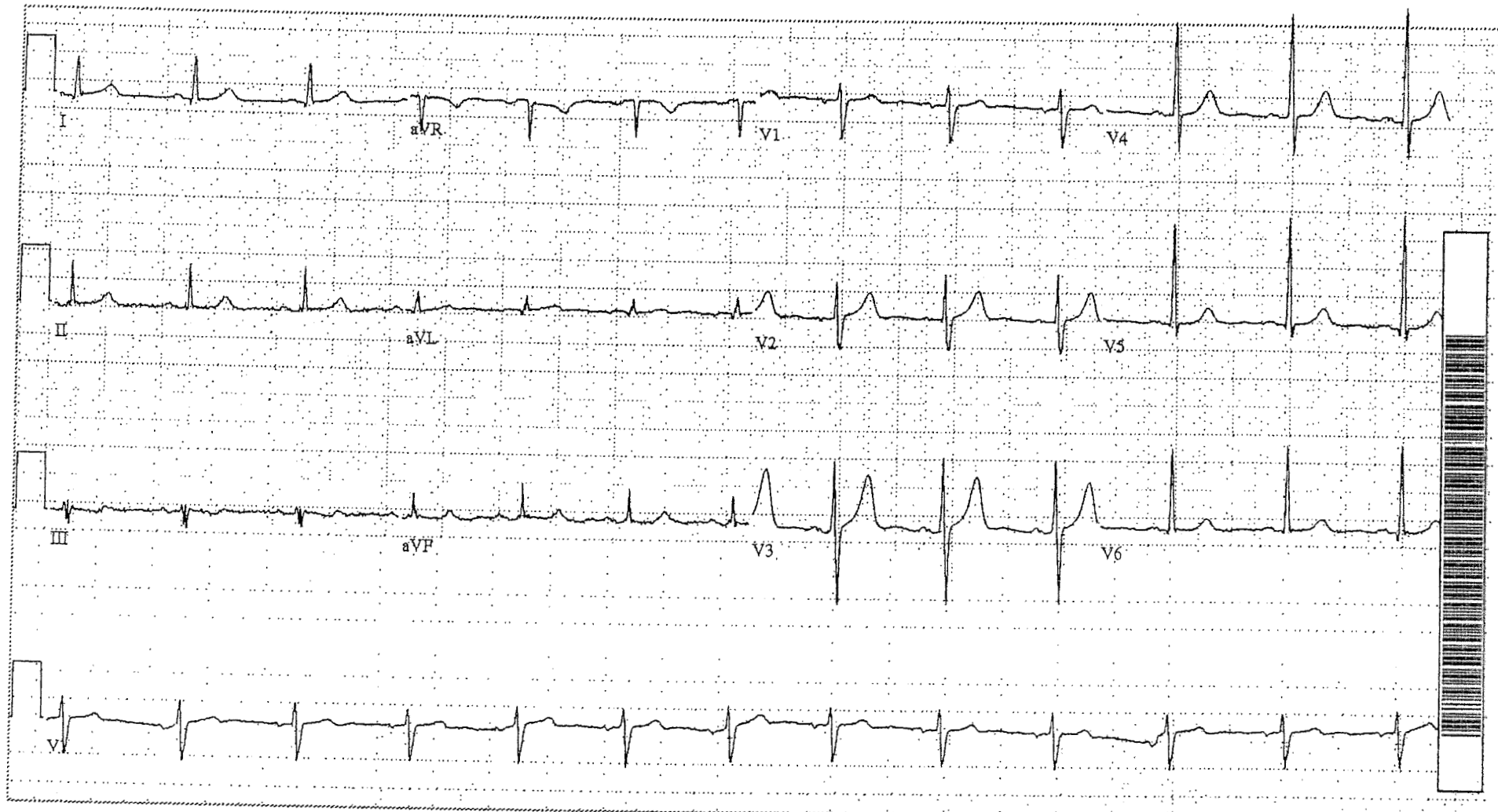
Vent. rate 76 BPM
PR interval 136 ms
QRS duration 84 ms
QT/QTc 374/420 ms
P-R-T axes 38 36 30

Normal sinus rhythm
Normal ECG
No previous ECGs available
Final ECG interpretation and report interpreted by Murali N. Bathina M.D.

Technician: MFOWLERS
Test ind: PRE SURGERY

Referred by: R TYLER FRIZZELL

Interpreted By: MURALI BATHINA M.D.



10mm/mV 150Hz 7.0.2 12SL 237 CID: 1

SID: 302877790 EID: 611 EDT: 20:38 10-APR-2008 ORDER:

Page 1 of 1

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EXHIBIT B

ELLSWORTH, KALLAS, TALBOY & DeFRANCO, P.L.L.C.

ATTORNEYS AT LAW

Joseph L. Ellsworth
Rick D. Kallas*

* Licensed in Idaho and Oregon

Robert W. Talboy
John C. DeFranco

May 16, 2008

Via Facsimile & U.S. Mail
(208) 327-7518

Julie Olser
Liberty Northwest Insurance Co.
6213 N. Cloverdale Road, Ste. 150
P.O. Box 7507
Boise, ID 83707-1507

Re: (1) Request for Copy of Transcript From 5/16/08 Recorded Statement
(2) 2nd Request for Authorization for Lumbar Spine Surgery
(3) 2nd Request for Immediate Payment of TTD Benefits

Claimant: Robert A. Watson
EER: Joslin Millwork, Inc.
Date of Manifestation: May 8, 2008

Dear Ms. Osler:

On 5/8/08, I sent Liberty Northwest a Notice of Legal Representation letter and placed employer / surety on written notice of the manifestation of Robert Watson's lumbar spine occupational disease claim. In my 5/8/08 letter, I also made claim for medical benefits in the form of the L5-S1 microdiscectomy recommended by Dr. Frizzell and a claim for income benefits in the form of total temporary disability (TTD) benefits.

On 5/13/08, I telephoned Liberty Northwest and I was informed that you were the claims examiner assigned to Mr. Watson's claim. On 5/13/08, we had a telephone conversation regarding Mr. Watson's claim. During our 5/13/08 telephone conversation, you indicated that it would take approximately 3 – 4 weeks to complete your investigation of Mr. Watson's claim. As part of Liberty Northwest's investigation, you indicated that Liberty Northwest's Investigator, Tom Groat, would need to take Mr. Watson's recorded statement.

On Friday, 5/16/08, Liberty Northwest Investigator, Tom Groat, took Mr. Watson's recorded statement at my office. Please provide me with a copy of the written transcript from Mr. Watson's 5/16/08 recorded statement as soon as it becomes available.

You should now have all the information you need in order to complete your investigation of Mr. Watson's occupational disease claim. Please complete your investigation of Mr. Watson's 5/8/08 worker's compensation claim as soon as possible and (1) authorize the lumbar spine surgery recommended by Dr. Frizzell; and, (2) initiate the payment of total temporary disability (TTD) benefits.

Transmitted / enclosed herewith please find a list of Mr. Watson's medical providers from the past 10 years. If you need any additional information in order to complete your investigation of Mr. Watson's 5/8/08 worker's compensation claim, please identify the specific information that

you need and I will exercise my best efforts to obtain that information. Thank you for your prompt attention to these matters.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rick D. Kallas". The signature is fluid and cursive, with the first name "Rick" being more prominent.

Rick D. Kallas

RDK/tl
Enclosure
CC: Robert Watson

EXHIBIT C

ELLSWORTH, KALLAS, TALBOY & DeFRANCO, P.L.L.C.

ATTORNEYS AT LAW

Joseph L. Ellsworth
Rick D. Kallas*

* Licensed in Idaho and Oregon

Robert W. Talboy
John C. DeFranco

May 28, 2008

Via Facsimile & U.S. Mail
(208) 327-7518

Julie Olser
Liberty Northwest Insurance Co.
6213 N. Cloverdale Road, Ste. 150
P.O. Box 7507
Boise, ID 83707-1507

Re: (1) 2nd Request for Copy of Transcript From 5/16/08 Recorded Statement
(2) 3rd Request for Authorization for Lumbar Spine Surgery
(3) 3rd Request for Immediate Payment of TTD Benefits

Claimant: Robert A. Watson
EER: Joslin Millwork, Inc.
Date of Manifestation: May 8, 2008

Dear Ms. Olser:

On 5/8/08, I submitted Mr. Watson's notice of manifestation of an occupational disease and requested authorization for the lumbar spine surgery recommended by Dr. Frizzell and payment of TTD benefits.

On 5/16/08, I faxed and mailed you a letter requesting the following information:

- (1) A copy of the written transcript from Mr. Watson's 5/16/08 recorded statement;
- (2) Authorization from Liberty Northwest to proceed with the lumbar spine surgery recommended by Dr. Frizzell; and,
- (3) The immediate payment of Mr. Watson's total temporary disability (TTD) benefits.

As of this date, I have not received a response to my 5/8/08 demand letter or my 5/16/08 demand letter.

Please complete your investigation and make an acceptance / denial decision of Mr. Watson's lumbar spine occupational disease claim on or before Friday, 6/13/08. If employer / surety cannot complete its investigation of Mr. Watson's worker's compensation claim on or before 6/13/08, please explain why employer / surety need an extension of time to complete their investigation of this matter and give me a specific date when a decision will be made so I can forward that information to Mr. Watson. If you have any questions regarding the information set forth herein, please contact me at your convenience. Thank you for your attention to these matters.

Very truly yours,


Rick D. Kallas

RDK/H
CC: Robert Watson

E. Scott Harmon
 ISB 3183
 LAW OFFICES OF HARMON, WHITTIER & DAY
 6213 N. Cloverdale Rd., Ste. 150
 P.O. Box 6358
 Boise, ID 83707-6358
 Telephone (208)327-7563
 FAX 800-972-3213
Employees of the Liberty Mutual Group

Attorney for Defendants

**BEFORE THE INDUSTRIAL COMMISSION
 OF THE STATE OF IDAHO**

Robert A. Watson,

Claimant,

vs.

Joslin Millwork, Inc.,

Employer,

and

Liberty Northwest Insurance Corporation,

Surety,

Defendants.

I.C. No. 2008-017579

**OBJECTION TO
 REQUEST FOR
 EMERGENCY
 HEARING**

INDUSTRIAL COMMISSION

AUG -- 7 2008

FILED

COME NOW the Defendants herein and object to Claimant's Request for Emergency hearing for the following reasons:

1. Claimant's discovery responses were just received on 8/6/08. It is clear from these responses that Claimant did not initially inform Defendants of his prior lumbar problems in 2005 for which he sought care from Chiropractor Meissner. Defendants initially requested records from Dr. Meissner and

E. Scott Harmon
ISB 3183
LAW OFFICES OF HARMON, WHITTIER & DAY
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-6358
Telephone (208)327-7563
FAX 800-972-3213
Employees of the Liberty Mutual Group

Attorney for Defendants

**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

| | | |
|--|---|----------------------|
| Robert A. Watson, |) | |
| |) | |
| Claimant, |) | I.C. No. 2008-017579 |
| |) | |
| vs. |) | |
| |) | |
| Joslin Millwork, Inc., |) | OBJECTION TO |
| |) | REQUEST FOR |
| Employer, |) | EMERGENCY |
| |) | HEARING |
| and |) | |
| |) | |
| Liberty Northwest Insurance Corporation, |) | |
| |) | |
| Surety, |) | |
| |) | |
| Defendants. |) | |

COME NOW the Defendants herein and object to Claimant's Request for
Emergency hearing for the following reasons:

1. Claimant's discovery responses were just received on 8/6/08. It is clear from these responses that Claimant did not initially inform Defendants of his prior lumbar problems in 2005 for which he sought care from Chiropractor Meissner. Defendants initially requested records from Dr. Meissner and

were informed that Claimant had never been treated by him. Upon telephone contact with Dr. Meissner's office, and advising that Defendants had received one record that originated from his office from other sources, they rechecked their filing and found that Claimant's file had been misfiled. Defendants recently received a complete copy of Dr. Meissner's records approximately 10 days ago.

2. Also Claimant's discovery responses received on 8/6/08, disclosed that Claimant previously sought treatment in California for conditions that are unknown to Defendants. Defendants are in the process of requesting the records from the California medical providers and will not be able to fully evaluate this case until the records are received.
3. Defendants are unclear whether Dr. Frizzell's medical opinion regarding occupational disease is based on all of Claimant's prior medical records. Therefore, until we have the California records and assure that Dr. Frizzell or any other physician has reviewed all medical records, the issue of causation and any pertinent defenses cannot be noted, nor can this matter be ready for hearing.

Based on the above, Defendants state that it is premature to schedule this case for an emergency hearing because the main issue is causation. To investigate and evaluate the issue of causation will require receipt of all prior medical records, review of ALL prior records by Dr. Frizzell and/or other physician of Defendants' choosing; and an opinion issued based on that review. Until that has been completed, Defendants request that the emergency hearing be denied.

DATED this 2nd day of August, 2008.

LAW OFFICES OF HARMON, WHITTIER & DAY



E. Scott Harmon
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 2nd of August, 2008, a true and correct copy of the foregoing document was served by first class mail, postage prepaid, upon the following at the address indicated:

Rick Kallas
Attorney at Law
1031 E Park Blvd.
Boise, ID 83712



E. Scott Harmon

Rick D. Kallas
Idaho State Bar No. 3872
Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.
1031 E. Park Blvd.
Boise, Idaho 83712
Telephone: (208) 336-1843
Facsimile: (208) 345-8945

2008 AUG - 8 1 P 2:40
RECEIVED
INDUSTRIAL COMMISSION

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

| | | |
|-----------------------------|---|--|
| ROBERT A. WATSON, |) | |
| |) | |
| Claimant, |) | I.C. No. 2008-017579 |
| |) | |
| vs. |) | |
| |) | CLAIMANT'S RESPONSE TO |
| JOSLIN MILLWORK, INC., |) | DEFENDANTS' OBJECTION TO |
| |) | CLAIMANT'S MOTION FOR EMERGENCY |
| Employer, |) | HEARING |
| |) | |
| and |) | |
| |) | |
| LIBERTY NORTHWEST INSURANCE |) | |
| CORPORATION, |) | |
| |) | |
| Surety, |) | |
| Defendants. |) | |
| |) | |
| |) | |

COMES NOW Claimant, Robert A. Watson, by and through his attorney of record, Rick D. Kallas, of the law firm of Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C., and hereby responds to the Defendants' Objection to Claimant's Motion For Emergency Hearing as follows:

Objection No. 1: The Defendants Just Received Dr. Meissner's Records 10 Days Ago

The Defendants have merely indicated that they just received Dr. Meissner's records 10 days ago

¹. The Defendants do not indicate how the undisclosed information in Dr. Meissner's records prevents them from being prepared for an Emergency Hearing on the medical / legal issues raised by the Claimant's Motion For Emergency Hearing. This Objection is completely without merit.

¹ Although the Defendants have apparently had possession of these records for 10 days, the Defendants have not supplemented their discovery responses and provided Claimant with a copy of Dr. Meissner's medical records.

Objection No. 2: The Claimant Received Medical Treatment For Unknown Medical Conditions In The State of California

The Claimant acknowledges the Defendants' right to review and analyze information which may appear in the Claimant's medical records from the state of California that could be relevant to the disputed medical / legal issues in this case. However, just because the Defendants do not have possession of 100% of all facts and data about the Claimant which may exist on planet Earth at this very moment in time, that does not equate to a finding that the Claimant failed to meet his burden of proving that he is entitled to an Emergency Hearing based on the standards set forth in J.R.P. 8 (D) and the comments thereto.

While the Claimant can appreciate the Defendants' desire to review all facts and data that are relevant to the disputed issues in this case before an Emergency Hearing is set, the Defendants should likewise appreciate that a human being who is suffering severe low back and leg pain should not be made to wait indefinitely to receive critical surgical care while medical records requests are mailed to out-of-state providers and responses slowly trickle in. The out-of-state medical providers sometimes ignore requests for medical records. If they do not respond, does that mean that a Claimant does not qualify for an Emergency Hearing? That would be unjust to the Claimant because he does not have any control over the actions of his former out-of-state providers. In other cases, the medical providers make mistakes just like Dr. Meissner did in this case and deny that the Claimant was even a patient. If providers make mistakes, does that mean that a Claimant cannot qualify for an Emergency Hearing?

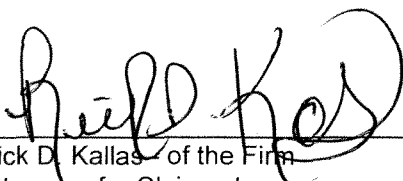
If the Defendants' Objection had any merit, a disabled worker in the state of Idaho would never be entitled to an Emergency Hearing because the worker's compensation surety could always prove that it was **less than 100% certain** that it had possession of all facts and data that might be relevant to the disputed issues in a case. We do not live in a world of absolute certainty and the Claimant does not have to prove that the Defendants have every single fact and every single piece of data in order to meet his Prima Facie case for showing entitlement to an Emergency Hearing.

Objection No. 3: Medical Experts Might Change Their Medical Causation Opinions Based on Unknown Facts / Data That Might Be Contained in Unknown Medical Records

With guidance from the Referee, the parties should be able to select an appropriate future date for an Emergency Hearing which gives the Defendants a reasonable opportunity to secure whatever medical records they deem critical to the medical causation question. However, the Industrial Commission should be wary of dismissing legitimate Motions For Emergency Hearings where the Claimant has met his burden of proving a Prima Facie Case for an Emergency Hearing under J.R.P. 8 (D) based on nothing more than the Defendants' speculation about what information might exist in out-of-state medical records.

RESPECTFULLY SUBMITTED this 8th day of August, 2008.

Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.

By 
Rick D. Kallas of the Firm
Attorneys for Claimant

Certificate of Service

I HEREBY CERTIFY that on the 8th day of August, 2008, I served Claimant's Response to Defendants' Objection To Claimant's Motion For Emergency Hearing by the method indicated below and addressed to the following:

E. Scott Harmon
Law Offices of Harmon, Whittier & Day
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-7563

☐ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivery
☒ Facsimile @ 1-800-972-3213


Tiffany Janos

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT A. WATSON,)
)
 Claimant,)
)
 v.)
)
 JOSLIN MILLWORK, INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
)

IC 2008-017579

ORDER GRANTING MOTION
FOR EMERGENCY HEARING

FILED

AUG 25 2008

INDUSTRIAL COMMISSION

On August 5, 2008, Claimant filed a Motion for Emergency Hearing with supporting affidavit. On August 7, 2008, Defendants filed an objection. On August 8, Claimant filed a response to Defendants' objection. Referee Michael E. Powers held a telephone conference with the parties on August 25, 2008. Pursuant to the Referee's review of the matter and for good cause shown,

The Industrial Commission of the State of Idaho hereby ORDERS that Claimant's motion is GRANTED.

NOTICE IS HEREBY GIVEN that a hearing will be held in the above-entitled matter on **December 19, 2008, at 1:30 p.m., for one-half day**, in the Industrial Commission hearing room, 700 S. Clearwater Lane, City of Boise, County of Ada, State of Idaho, on the issue of whether

ORDER GRANTING MOTION FOR EMERGENCY HEARING - 1

Claimant is entitled to the surgery recommended by R. Tyler Frizzell, M.D.

DATED this 25th day of August, 2008.

INDUSTRIAL COMMISSION


Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2008, a true and correct copy of the foregoing **ORDER GRANTING MOTION FOR EMERGENCY HEARING** was served by Certified United States mail upon each of the following persons:

RICK D KALLAS
1031 E PARK BLVD
BOISE ID 83712-7722

SCOTT HARMON
PO BOX 6358
BOISE ID 83707

E-mailed to Dean Willis


Gina Espinosa

ge

ORDER GRANTING MOTION FOR EMERGENCY HEARING - 2

E. Scott Harmon
ISB 3183
LAW OFFICES OF HARMON, WHITTIER & DAY
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-6358
Telephone (208)327-7563
FAX 800-972-3213
Employees of the Liberty Mutual Group
Attorney for Defendants

**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

ROBERT A. WATSON,

Claimant

vs.

JOSLIN MILLWORK, INC.,

Employer,

And

LIBERTY NORTHWEST INS. CORP.,

Surety,


Defendants.

I. C. No.: 2008-017579

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2008, a true and correct copy of Defendants' Supplemental Answers to Interrogatories and Supplemental Responses to Request for Production of Documents was served by regular United States Mail, postage prepaid, upon the following at the address indicated:

Rick Kallas
Attorney at Law
1031 E Park Blvd.
Boise, ID 83712



E. Scott Harmon

E. Scott Harmon
ISB 3183
LAW OFFICES OF HARMON, WHITTIER & DAY
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-6358
Telephone (208)327-7563
FAX 800-972-3213
Employees of the Liberty Mutual Group

Attorney for Defendants

**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

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INDUSTRIAL COMMISSION

| | | |
|--|---|-----------------------------|
| Robert A. Watson, |) | |
| |) | |
| Claimant, |) | |
| |) | I. C. No.: 2008-017579 |
| vs. |) | |
| |) | |
| Joslin Millwork, Inc., |) | DEFENDANTS |
| |) | PREHEARING NOTICE OF |
| Employer, |) | WITNESSES, EXHIBITS, |
| |) | AND POST-HEARING |
| and |) | DEPOSITIONS |
| |) | |
| Liberty Northwest Insurance Corporation, |) | |
| |) | |
| Surety, |) | |
| |) | |
| Defendants. |) | |
| |) | |

COME NOW the Defendants, Joslin Millwork, Inc., Employer, and Liberty Northwest Ins. Corp., Surety, by and through their attorney of record, E. Scott Harmon, and certify to the Industrial Commission in accord with Industrial Commission Judicial Rules of Practice and Procedure, Rule VIII and Rule X, the following:

1. The hearing is on the issues of:


- A. Whether Claimant is entitled to the surgery recommended by R. Tyler Frizzell.
- 2. It is unlikely that this case will settle prior to hearing.
- 3. The following exhibits may be introduced by Defendants at hearing:
 - A. 5/16/06 St. Alphonsus Regional Medical Center
1/4/08 Medical Records
 - B. 4/18/2008 St. Luke's
History & Physical
 - C. 12/13/05 Dr. Scott Meissner, DC
Medical Records
 - D. 1/17/08- Dr. James Bates
6/30/08 Medical Records
 - E. 12/12/07 Dr. Ranc
Medical Records
 - F. 10/1/2008 Dr. Michael Weiss
Medical Report
 - G. 7/29/08 Claimant's Answers to Discovery
w/o attachment

Defendants reserve the right to supplement the above exhibit listing.

- 4. Defendants do not intend to call any witnesses at the hearing.
- 5. Defendants intend to take the post-hearing deposition of Dr. Michael Weiss and reserve the right to supplement this disclosure should a determination be made to schedule any additional post-hearing depositions. Dr. Weiss' deposition will be scheduled upon identification of the parties available dates.

DATED this 8th day of December, 2008.

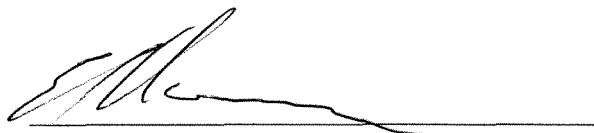
LAW OFFICES OF HARMON, WHITTIER & DAY


E. Scott Harmon
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2008, I caused a copy of the foregoing document to be served upon the following by first class mail, postage prepaid, at the address identified below:

Rick Kallas
Attorney at Law
1031 E Park Blvd.
Boise, ID 83712


E. Scott Harmon

E. Scott Harmon
ISB 3183
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6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-6358
Telephone (208)327-7563
FAX (800) 972-3213
Employees of the Liberty Mutual Group

Attorney for Defendants

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RECEIVED
INDUSTRIAL COMMISSION

**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

| | | |
|--|---|--------------------------|
| Robert A. Watson, |) | |
| |) | |
| Claimant, |) | I.C. No. 2008-017579 |
| |) | |
| vs. |) | |
| |) | |
| Joslin Millwork, Inc., |) | NOTICE OF TAKING |
| |) | POST-HEARING |
| Employer, |) | DEPOSITION OF |
| |) | DR. MICHAEL WEISS |
| and |) | |
| |) | |
| Liberty Northwest Insurance Corporation, |) | |
| |) | |
| Surety, |) | |
| |) | |
| Defendants. |) | |
| |) | |

TO: CLAIMANT, Robert A. Watson, and his attorney, Rick Kallas.


PLEASE TAKE NOTICE that the counsel for Defendants, Joslin Millwork, Inc. and Liberty Northwest Ins. Corp., will take the testimony upon oral examination of DR. MICHAEL WEISS, before M & M Court Reporters, Notary Public and Court Reporter, or in case of their inability to act or be present, before some other officer authorized to

administer oaths, on a date and time to be determined after Claimant's counsel has scheduled his expert's deposition and, based on the availability of counsel for the parties and Dr. Weiss, to be taken thereafter from day to day as the taking of the deposition may be adjourned, at the Offices of Harmon, Whittier & Day, 6213 N. Cloverdale Rd., Ste 150, Boise, Idaho at which time and place you are notified to appear and take such part in the examination as you may deem proper.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure and is taken to perpetuate hearing testimony.

DATED this 8th day of December, 2008.

LAW OFFICES OF HARMON, WHITTIER & DAY




E. Scott Harmon
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 8th day of December, 2008, a true and correct copy of the foregoing document was served by first class mail, postage prepaid, upon the following at the address indicated:

Rick Kallas
Attorney at Law
1031 E Park Blvd.
Boise, ID 83712

M & M Court Reporters
P. O. Box 2636
Boise, ID 83701



E. Scott Harmon

E. Scott Harmon
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Boise, ID 83707-6358
Telephone (208)327-7563
FAX (800) 972-3213
Employees of the Liberty Mutual Group

Attorney for Defendants

**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

| | | |
|--|---|-----------------------------|
| Robert A. Watson, |) | |
| |) | |
| Claimant, |) | I.C. No. 2008-017579 |
| |) | |
| vs. |) | |
| |) | |
| Joslin Millwork, Inc., |) | NOTICE OF TAKING |
| |) | POST-HEARING |
| Employer, |) | DEPOSITION OF |
| |) | Dr. Michael S. Weiss |
| and |) | |
| |) | |
| Liberty Northwest Insurance Corporation, |) | |
| |) | |
| Surety, |) | |
| |) | |
| Defendants. |) | |

TO: CLAIMANT, Robert A. Watson, and his attorney, Rick Kallas.


PLEASE TAKE NOTICE that the counsel for Defendants Joslin Millwork, Inc. and Liberty Northwest Ins. Corp. will take the testimony upon oral examination of Dr. Michael S. Weiss, before M & M Court Reporters, Notary Public and Court Reporter, or in case of their inability to act or be present, before some other officer authorized to administer oaths,

on 1/27/2009, commencing at 9:30 a.m. of said day and thereafter from day to day as the taking of the deposition may be adjourned, at the Law Offices Of Hamon, Whittier & Day (Liberty Northwest Ins.) 6213 N. Cloverdale Rd. Suite 150, Boise, Idaho at which time and place you are notified to appear and take such part in the examination as you may deem proper.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure and is taken to perpetuate hearing testimony.

DATED this 23rd day of December, 2008.

LAW OFFICES OF HARMON, WHITTIER & DAY



E. Scott Harmon
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 23rd day of December, 2008, a true and correct copy of the foregoing document was served by first class mail, postage prepaid, upon the following at the address indicated:

Rick Kallas
Attorney at Law
1031 E Park Blvd.
Boise, ID 83712

M & M Court Reporters
P. O. Box 2636
Boise, ID 83701


E. Scott Harmon

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT A. WATSON,)
)
 Claimant,)
)
 v.)
)
 JOSLIN MILLWORK, INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
 Surety,)
)
 Defendants.)
)

FILED

JUN 08 2009

INDUSTRIAL COMMISSION

IC 2008-017579

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted an emergency hearing in Boise on December 19, 2008. Claimant was present and represented by Rick D. Kallas of Boise. E. Scott Harmon, also of Boise, represented Employer and its Surety. Oral and documentary evidence was presented and the parties took one post-hearing deposition and submitted post-hearing briefs. This matter came under advisement on May 14, 2009, and is now ready for decision.

ISSUES

By agreement of the parties, the issues to be decided are:

1. Whether Claimant has incurred a compensable occupational disease, and, if so,
2. Whether Claimant is entitled to direct payment of 100% of his medical bills, and

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1

3. Whether Claimant is entitled to total temporary disability (TTD) benefits, and the extent thereof.

CONTENTIONS OF THE PARTIES

Claimant contends that he has incurred a compensable occupational disease doing heavy and repetitive work as a sawyer/assembler/cabinet maker/delivery driver that has resulted in a herniated lumbar disc requiring surgery. As this is a denied claim, should the same be found to be compensable, Surety should be required to pay Claimant directly 100% of the bills related to treatment to date, as well as to be incurred in further treatment, including surgery. Finally, Surety should be required to pay TTD benefits during Claimant's period of recovery.

Defendants concede that the lumbar microdiscectomy recommended by Claimant's treating physician is reasonable; however, they argue that the need for such surgery is not related to Claimant's work. Claimant had underlying degenerative disc disease and facet arthritis prior to his employment with Employer as a sawyer, and it is not possible to date a free-floating disc fragment apparent on an MRI. Claimant's lumbar spine disease was not incurred in or arise out of and in the course of his employment. Further, if the Commission finds otherwise, Surety is not required to pay 100% of any prospective treatment; only 100% up to the time of the Commission's finding of compensability. Finally, in the event compensability is found, the extent of TTD benefits owed will work itself out.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1-14 admitted at the hearing.
2. Defendants' Exhibits A-G admitted at the hearing.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

3. The post-hearing deposition of Michael S. Weiss, M.D., taken by Defendants on January 27, 2009.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 31 years of age and resided in Nampa at the time of the hearing.
2. Claimant had been employed as a sawyer for Employer less than a year and a half when he began to develop back pain on or around November 2007. Claimant is not contending that he suffered an accident, but is contending that the heavy/repetitive nature of his work duties resulted in his lumbar disc disease. Claimant described his job duties as follows:

Lifting/carrying of 4 x 8 Laminated Panels of Laminated Particle Board

I use the forklift on the production floor to pick up a pallet/unit of laminated particle board (approximately 34 sheets) and move it into position near the beam saw. After placing the pallet/unit on the floor with the forklift, I have to physically reach out away from my body with both hands/arms and grab each individual 4 x 8 sheet off of the stacked pallet/unit. Each sheet weighs approximately 150 pounds. After I grab and lift the sheet, I have to twist and turn my body around approximately 180 degrees and then maneuver the sheet onto the saw and place it in the proper cutting position. I then perform cuts to specifications with the saw. After the product has been cut to specification, I will manually pick up each cut and stack the individual cut sheets into a stack on the fall-off table which is attached to the saw. After I stack 4-6 individual cut pieces, I then manually grab the entire stack, lift it, turn and carry it approximately 15-20 feet where I place it on a parts cart. The cart has two shelves. The upper shelf is approximately 40 inches off of the ground and the lower shelf is approximately 10 inches off the ground. When I slide the cut pieces into the shelves, I bend and twist at the waist in order to manipulate and position the cut product. In order to place the cut product on the lower shelf, I have to bend all the way down almost to the floor and then bend over at the waist and slide the product onto the lower shelf by pushing with both arms outstretched away from my body. Most of the time, I have to stretch my leg out and place my right foot behind the wheel on the cart in order to prevent it from moving or slipping away during the shelving process. During a standard 8.0 hour work shift, I will lift, carry, twist, turn, bend at the waist, push and pull these laminate sheets approximately 6 out of every 8

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 3

hours or 75% to 80% of the time. As part of the production cycle, I am required to perform these physical movements repeatedly at a very fast pace (i.e., as fast as the saw will cut the product and as fast as I can move my body while lifting and carrying these heavy sheets of laminate).

Claimant's Exhibit 3, p. 1, and Hearing Transcript, pp. 22-33.

3. Claimant's job duties also required him to load and off-load finished cabinets at the customer's location.

4. Sometime in November 2007, Claimant began to feel a sharp, cramping pain in his left buttock that radiated down to the back of his left knee. He initially presented to a chiropractor, who treated him on December 12, 2007. It is unclear from the record what treatment the chiropractor provided, but Claimant was diagnosed with lumbar ligament laxity and sciatica (no disc). Claimant testified that he saw the chiropractor several times, but the only record in evidence is just for the December 12 visit. In any event, the chiropractor referred Claimant to James H. Bates, M.D., a physiatrist.

5. Claimant first saw Dr. Bates on January 27, 2008, with a chief complaint of cramping and pain in his left buttock and leg. Dr. Bates prescribed Darvocet, a Medrol Dosepak, and stretching exercises. Dr. Bates continued to monitor Claimant's medications and on January 22 ordered a lumbar MRI that revealed a moderate-sized left paracentral disk herniation at L5-S1 with a free-floating fragment. Based on the MRI, Dr. Bates referred Claimant to R. Tyler Frizzell, M.D., a neurosurgeon.

6. Dr. Frizzell first saw Claimant on March 6, 2008. Upon examination and lack of success with conservative care, Dr. Frizzell recommended a microdiscectomy at L5-S1. Surety has denied authorization for that procedure and, consequently, it has not been performed.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

DISCUSSION AND FURTHER FINDINGS

As in industrial accident claims, an occupational disease claimant must prove a causal connection between the condition for which compensation is claimed and the occupation to a reasonable degree of medical probability. Langley v. State of Idaho, Special Indemnity Fund, 126 Idaho 781, 786, 890 P.2d 732, 737 (1995).

Pertinent Idaho statutes in effect at the time of the alleged manifestation of Claimant's occupational disease include Idaho Code §72-102(22) which defines occupational diseases and related terms as follows:

- (a) "Occupational disease" means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment, but shall not include psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.
- (b) "Contracted" and "incurred" when referring to an occupational disease, shall be deemed the equivalent of the term **"arising out of and in the course of" employment.**
- (c) "Disablement," except in cases of silicosis, means the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease, and "disability" means the state of being so incapacitated.

Emphasis added.

Idaho Code §72-437 defines the right to compensation for an occupational disease:

When an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, or in case of his death, his dependents shall be entitled to compensation.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 5

Lastly, Idaho Code §72-439 provides:

An employer shall not be liable for any compensation for an occupational disease **unless such disease is actually incurred in the employer's employment.** Emphasis added.

7. Claimant has offered as proof that he contracted an occupational disease a letter sent to Dr. Frizzell outlining the legal requirements of finding such disease, as well as enclosing Claimant's medical records and job description. *See*, Claimant's Exhibit 8, pp. 10-40. Dr. Frizzell responded by succinctly typing the word "Yes" following each question posed by Claimant's counsel.

8. Surety arranged for Claimant to be independently examined by Michael Weiss, M.D., on October 1, 2008. Dr. Weiss is Board Certified in Occupational Medicine, Physical Medicine and Rehabilitation, and Electrodiagnostic Medicine. He also has a degree in epidemiology, which he described in his deposition as the study of disease in populations. He is a "consultant physician." He is the director of Saint Luke's Regional Medical Center's occupational health services program. Dr. Weiss consults for the State Insurance Fund, Idaho Division of Vocational Rehabilitation, and a case management firm named Paradigm Health.

9. Dr. Weiss reviewed medical records and a job description, examined Claimant, and took his history. He reached the diagnosis of chronic low back pain with sciatica. He noted that back pain is very common in the population which makes it difficult to "... say what's causal in something that everybody has." Dr. Weiss Deposition, p. 17. He further noted that Claimant's January 23, 2008, lumbar MRI revealed advanced degenerative disc disease at L5-S1 and moderate to severe left L4-L5 and mild-moderate bilateral L5-S1 facet joint arthropathy. Dr. Weiss opined that it was not possible to determine when the free fragment occurred, but that

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 6

Claimant does not have sufficient physical findings to conclude that the free fragment is causing his back pain.

10. Dr. Weiss sees no connection between Claimant's need for back surgery and his employment. He concedes that heavy materials handling is associated with chronic back pain as is strictly sedentary work. Dr. Weiss is troubled that there was no specific event that could be temporally related to the onset of Claimant's back pain. He acknowledged that high impact activity can lead to the progression of underlying arthritis, but does not cause it.

11. The Referee is persuaded by Dr. Weiss's observations. He has the credentials to render a well-reasoned expert opinion. The major hurdle facing Claimant is set out in question number 4 posed by Claimant to Dr. Frizzell: "In my opinion, do I believe that Mr. Watson's disease was incurred in or arose out of and in the course of his employment with Joslin Millwork, Inc.?" Dr. Frizzell responded, "Yes." The Referee questions how Dr. Frizzell could reach that conclusion. Degenerative disc disease and facet arthritis develop over time. In fact, Claimant saw a chiropractor for low back pain on December 13, 2005, and was taken off work for a few days. Dr. Meissner's records from December 2005 reflect that Claimant's low back pain arose without accident and was first noted on a Sunday, while at home. Also, prior to the commencement of his employment by Joslin, Claimant had complained to another employer that he hoped to get out of the drywall business because it was causing him low back pain. Claimant's underlying degenerative joint disease and arthritis was certainly present in November 2007 and was not caused by his work. According to Dr. Weiss, degenerative disc disease may be caused by many factors including heredity, aging, diet, smoking, and obesity. It would be reasonable to conclude that Claimant's heavy/repetitive work activities (with which Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7

do not disagree) may have speeded the progression of his underlying disease, but *Nelson*¹ and its progeny preclude recovery as there is no accident here.

12. Claimant cites *Flores v. Boise Cascade*, 2008 IIC 0420 (2008) and *Wiltz v. Subway*, 2001 IIC 0867 (2001) in support of his argument that Claimant has met his burden of proving a compensable occupational disease. Although, *Flores* bears some similarity to the instant matter, that case was decided on its own particular facts, and on those facts, the Commission was persuaded that Claimant's low back injury was, in fact, causally related to the demands of his employment. The Referee does not find that the evidence before him in this matter supports the same conclusion.

13. In *Flores*, the Commission further found that claimant had satisfied his burden of proving that the risk to which he was exposed was characteristic of and peculiar to his employment. Under Idaho Code § 72-102(22), claimant must show that his employment results in exposure to a hazard which distinguishes that particular employment from the general run of occupations. *Bowman v. Twin Falls Construction Company, Inc.*, 199 Idaho 312, 581 P.2d 770 (1978). In *Flores*, there was unrebutted expert testimony that claimant's work involved constant repetition of three activities, which led the Commission to conclude that claimant had met his burden of proving that the risk to which he was exposed was characteristic of and peculiar to his employment. Claimant has also cited *Wiltz v. Subway*, 2001 IIC 0867 (2001) in support of the proposition that the risk of injury to which claimant was exposed in this matter is characteristic of and peculiar to his employment. In *Wiltz*, the Commission found that a particular hand motion used by claimant to operate a manual vegetable slicer subjected her to a risk of injury that was distinguishable from the general run of occupations.

¹ *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).

14. Neither *Flores* nor *Wiltz*, support a finding that the particular activities in Claimant's job constitute a risk of injury that is distinguishable from the general run of occupations. To be sure, Claimant's job involved a good deal of heavy lifting, twisting, bending, etc. However, so do many, if not most, jobs which involve manual labor. Here, no particular machine, or constant repetitive activity is implicated in causing Claimant's disease, even if it be assumed that Claimant's condition is causally related to his employment. This case is more like *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996), and accordingly, the Referee finds that claimant has failed to establish that his disease is the result of his exposure to a risk of injury which is characteristic of and peculiar to his employment at Joslin.

15. The Referee finds that Claimant has failed to prove that his need for surgery is the result of an occupational disease arising out of and in the course of his employment.

16. Based on the above finding, the remaining issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that the need for his lumbar surgery is the result of an occupational disease arising out of and in the course of his employment.

2. All other issues are moot.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 9

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

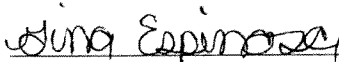
DATED this 21st day of May, 2009.

INDUSTRIAL COMMISSION



Michael E. Powers, Referee

ATTEST:


Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

RICK D KALLAS
1031 E PARK BLVD
BOISE ID 83712-7722

SCOTT HARMON
PO BOX 6358
BOISE ID 83707



FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 10

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT A. WATSON,)
)
 Claimant,)
)
 v.)
)
 JOSLIN MILLWORK, INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
 Surety,)
)
 Defendants.)
)

FILED
JUN 08 2009
INDUSTRIAL COMMISSION
IC 2008-017579
ORDER

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

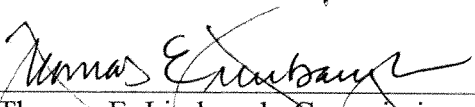
1. Claimant has failed to prove that the need for his lumbar surgery is the result of an occupational disease arising out of and in the course of his employment.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.


ORDER - 1

DATED this 8th day of June, 2009.

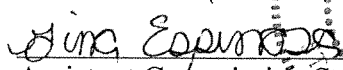
INDUSTRIAL COMMISSION


R.D. Maynard, Chairman


Thomas E. Limbaugh, Commissioner


Thomas P. Baskin, Commissioner

ATTEST:


Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2009, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICK D KALLAS
1031 E PARK BLVD
BOISE ID 83712-7722

SCOTT HARMON
PO BOX 6358
BOISE ID 83707

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ORDER - 2

Rick D. Kallas
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1031 E. Park Blvd.
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Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RECEIVED
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ROBERT A. WATSON,

Claimant,

vs.

JOSLIN MILLWORK, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Surety,
Defendants.

I.C. No. 2008-017579

CLAIMANT'S MOTION FOR CORRECTION
OF ERRATUM AND MOTION FOR
RECONSIDERATION OF JUNE 8, 2009
DECISION

(I) **MOTION**

COMES NOW Claimant, Robert A. Watson, by and through his attorney of record, Rick D. Kallas, of the law firm of Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C. and pursuant to Idaho Code §72-718, Idaho Code §72-713, J.R.P. 3 (F), and J.R.P. 1 (B) (6) hereby moves the Industrial Commission for entry of the ORDERS OF ERRATUM and ORDERS ON RECONSIDERATION set forth below in section (III).

(II) **GROUND'S FOR MOTION**

This Motion is based on the evidence, records, papers and pleadings on filed before the Industrial Commission and the Claimant's Brief In Support of Motion For Correction of Erratum and Motion For Reconsideration which is filed contemporaneously herewith.

(III) ORDERS REQUESTED BY CLAIMANT

(1) An ORDER OF ERRATUM which adds a new paragraph No. 4 to the EVIDENCE CONSIDERED on page 3 of the Decision to accurately reflect the evidence that the Industrial Commission considered and relied on the December 19, 2008 hearing testimony of the Claimant, Robert A. Watson;

(2) An ORDER ON RECONSIDERATION amending Finding of Fact No. 2 in the following particulars:

(a) Finding of Fact No. 2 should be amended to accurately reflect the evidence that the Claimant developed more than just low back pain in November of 2007. In fact, the evidence reflects that the Claimant developed left lower back pain accompanied by a sharp cramping like pain in his left buttocks that traveled down his left leg to his left knee in November of 2007 (Tr., P. 36, Ll. 12 – 16) (Bates No. 005002 – 005006); (Bates No. 006001-006002); (Bates No. 007001- 007002);

(b) Finding of Fact No. 2 should be amended to accurately reflect the evidence that the Claimant is not just contending that he engaged in generic heavy / repetitive work common to the general run of manual labor occupations. The Claimant is contending that he was exposed to very specific hazards of lumbar spine degenerative disc disease that were characteristic of and peculiar to his job as a Sawyer / Assembler including, but not limited to the following: The Claimant was required to stand in a relatively static position in a confined 5 X 7 foot space between a piece of machinery that he operated known as a beam saw, his forklift, and unit (pallet) of stacked 4 X 8 sheets of particle board. Each 4 X 8 sheet of particle board weighed 150 pounds. In order to physically move each 4 X 8 sheet of 150 pound particle board off of the forklift / unit stack and place it onto the bed of the beam saw, the Claimant would have to **reach out away from his body and manually grab** each 4 X 8 sheet. He would then **lift** each 150 pound sheet of 4 X 8 particle board while twisting / turning his body around approximately 180 degrees in order to manually position each 4 X 8 sheet onto the bed of the beam saw machine (Exhibit No. 3) (Tr., p. 22, L. 13 – p. 36, L. 5). The Claimant was performed this combined lifting, twisting and turning movement (i.e., torquing maneuver) approximately **30 to 50 times** during each 8 hour shift (Tr., p. 26, L. 23 – p. 27, L. 4). The total combined weight that the Claimant was required to manually lift and torque each day was between **4,500 and 7,500 pounds** during a standard 8.0 hour work shift. All of these movements had to be performed at the very fast pace of the production cycle (Exhibit No. 3). The Claimant performed these combined lifting /

twisting movements repeatedly for long periods of time up to 75% to 80% of every 8.0 hour work shift; and,

(c) Finding of Fact No. 2 should be amended to accurately reflect the evidence the Claimant is contending that his exposure to particular hazards of his job as a Sawyer / Assembler at Joslin Millwork caused lumbar disc disease which eventually resulted in the L5-S1 disc herniation with extruded fragment that was displacing his traversing left S1 nerve root and was causing his left lower extremity radiculopathy in November of 2007.

(3) An ORDER ON RECONSIDERATION amending Finding of Fact No. 4 to accurately reflect the evidence that the Claimant testified truthfully at the 12-19-08 hearing when he stated that he had treated with Dr. Ranck on several occasions because there is a billing statement from Dr. Ranck in evidence before the Commission which describes the treatment that Dr. Ranck provided to the Claimant **on 6 different occasions** between 12/12/07 and 1/3/08 (See Bates No. 011003).

(4) An ORDER OF ERRATUM changing Finding of Fact No. 5 to accurately reflect the evidence that the Claimant first saw Dr. Bates on January 17, 2008 – not January 27, 2008 (Bates No. 007001).

(5) An ORDER ON RECONSIDERATION amending Finding of Fact No. 5 in the following particulars:

(a) Finding of Fact No. 5 should be amended to accurately reflect that the January 23, 2008 lumbar spine MRI ordered by Dr. Bates revealed more than just a moderate-sized left paracentral disk herniation at L5-S1 with a free-floating fragment. The MRI also revealed that the free fragment at the L5-S1 level of the Claimant's spine was causing displacement of the Claimant's traversing left S1 nerve root posteriorly and producing sciatica or radicular symptoms down the Claimant's left leg (Bates No. 009001) (Weiss Depo., p. 36, L. 3 – p. 38, L. 15); and,

(b) Finding of Fact No. 5 should be amended to accurately reflect that the objective findings on the Claimant's January 23, 2008 MRI would correlate with the Claimant's subjective complaints of left buttock cramping and pain that traveled from the left lower back down the posterior aspect of the Claimant's left leg to his left knee as reported by the Claimant to Dr. Ranck, the medical providers at St. Alphonsus Regional Medical Center and Dr. Bates (See Exhibit No. 5, Exhibit No. 6 and Exhibit No. 7).

(6) An ORDER ON RECONSIDERATION amending Finding of Fact No. 6 to accurately reflect the evidence that the Claimant's back surgery had not been performed as of the date of the December 19, 2008

Hearing.

(7) **An ORDER ON RECONSIDERATION** amending paragraph No. 7 in the following particulars:

(a) Paragraph No. 7 should be amended to accurately reflect all of the evidence that the Claimant presented to the Industrial Commission to prove that his lumbar spine occupational disease was contracted / incurred in his Sawyer / Assembler job at Joslin Millwork including, but not limited to:

(1) Claimant's Hearing Exhibits 1 – 14;

(2) The Claimant's April 29, 2008 prima facie case occupational disease letter to Dr. Frizzell with Exhibits A – D (Bates No. 008010 – 008038);

(3) Dr. Frizzell's May 5, 2008 letter to Claimant's counsel (Bates No. 008039-008040);

(4) Dr. Frizzell's October 30, 2008 letter wherein Dr. Frizzell confirmed that his medical causation opinions were not changed by the analysis in Dr. Weiss' October 1, 2008 IME report (Bates No. 008041 – 008042);

(5) Dr. Bates' December 4, 2008 letter to Claimant's counsel (Bates No. 007016);

(6) Certain medical testimony, admissions and concessions made by the Defendants' IME physician, Michael S. Weiss, M.D., during his January 27, 2009 post-hearing deposition;

(7) The evidence before the Commission which ruled out every other potential cause for the Claimant's L5-S1 herniated disc with extruded fragment including, but not limited to, the Claimant's unrefuted denials that he participated in gardening activities, home woodworking, racket sports, bicycle riding, weight lifting, golfing, home auto repair, aerobics, volleyball, archery, playing musical instruments, martial arts, bowling, softball, baseball, basketball, football, water skiing, snow skiing, motorcycle riding, 4 X 4 wheeling, or 3-wheeling (Bates No. 004019 – 004021). (See pp. 7-8 of Claimant's May 7, 2009 Post-Hearing Reply Brief);

(b) Paragraph 7 should be amended to accurately reflect the law that the Claimant is not required to call his attending neurosurgeon live at Hearing or take his post-hearing deposition in order to meet his burden of proving that he contracted / incurred his lumbar spine occupational disease based on exposure to particular hazards in his job as a Sawyer / Assembler for Joslin Millwork:

This Court has held that ***no special verbal formula is necessary*** when a doctor's testimony plainly and unequivocally conveys his conviction that events are causally related. *Jensen*, 135 Idaho at 412-13, 18 P.3d at 217-18 (citing

Paulson v. Idaho Forest Indus., Inc., 99 Idaho 896, 901, 591 P.2d 143, 148 (1979), overruled on other grounds by *Jones v. Emmett Manor*, 134 Idaho 160, 165, 997 P.2d 621, 625 (2000) (holding that "To the extent *Dean v. Dravo Corp.*, 95 Idaho 558, 511 P.2d 1334 (1973) and *Paulson* . . . **suggest a requirement of oral medical testimony in every case, the suggestion is disavowed.**"). Rather even if a doctor expressly refuses to say the words "reasonable degree of medical probability," it can still be clear from his or her testimony that he or she considers that a claimant's injury more likely than not was caused by a work related accident. *Jensen*, 135 Idaho at 412, 18 P.3d at 217. *Stevens- McAtee v. Potlatch Corp.*, 145 Idaho 325, 334, 179 P.3d 288, 297 (2008) (emphasis supplied).

and,

- (c) Paragraph No. 7 should be amended to reflect the evidence that the Claimant presented sufficient evidence to meet his burden of proving a "prima facie case" for a compensable lumbar spine occupational disease claim and, in fact, the Defendants have already conceded that the Claimant introduced sufficient evidence to prove his prima facie case and meet his burden of proof.

"At best, with the opinion of Dr. Frizzell, **Claimant has met his prima facia [sic] [facie] case / burden of proof**" (Def. Resp. Br., p. 13) (emphasis supplied).

- (8) **An ORDER ON RECONSIDERATION** amending paragraph No. 9 in the following particulars:

- (a) Paragraph No. 9 should be amended to accurately reflect the admissions made by the Defendants' IME medical expert, Michael S. Weiss, M.D., during his January 27, 2009 post-hearing deposition including, but not limited to:

- (1) Dr. Weiss admitted under oath in his January 27, 2009 post-hearing deposition that he could **not** identify all of the records that were provided to him by the Defendants before conducting his October 1, 2008 IME examination and when asked to specifically identify all of the records Dr. Weiss testified "***You know, I actually don't know***" and "***What I'm saying is, I don't know***" (Weiss depo, p. 32, L. 13 and L. 23);

- (2) Dr. Weiss admitted under oath in his January 27, 2009 post-hearing deposition that he did **not** **review the Claimant's job description** set forth in Exhibit No. 3 **before** he conducted the Claimant's October 1, 2008 IME examination (Weiss Depo, p. 34, LI. 15-22). Therefore, the evidence before the Commission confirms that Dr. Weiss **admitted under oath that he did not know anything** about the **particular hazards of the Claimant's job duties** at Joslin Millwork at the time when he issued his 10/1/08 IME report;

- (3) Dr. Weiss admitted under oath in his January 27, 2009 post-hearing deposition that he did **not** ask

the Claimant to describe his work activities at Joslin Millwork at any time while taking the Claimant's history during his 10/1/08 IME examination of the Claimant (Weiss Depo, p. 45, L25 – p. 47, L3). Therefore, the evidence before the Commission confirms that Dr. Weiss **admitted under oath that he did not know anything** about the particular hazards of the Claimant's job duties at Joslin Millwork at the time when he issued his 10/1/08 IME report; and,

(4) Dr. Weiss admitted under oath in his January 27, 2009 post-hearing deposition that he did not review a copy of the December 19, 2008 Hearing transcript which contained the Claimant's detailed description of his job activities at Joslin Millwork before he testified during his January 27, 2009 post-hearing deposition (Weiss Depo, p. 34, LI. 6 – 9). Therefore, the evidence before the Commission confirms that Dr. Weiss **admitted under oath that he did not know anything** about the **particular hazards** of the Claimant's job duties at Joslin Millwork at the time when he issued his 10/1/08 IME report and at the time when he testified during his 1/27/09 post-hearing deposition that the Claimant's work activities did not cause the Claimant's lumbar spine disc disease;

(5) Dr. Weiss admitted during his 1/27/09 deposition that the Claimant's January 23, 2008 lumbar spine MRI showed more than just degenerative disc disease. Dr. Weiss admitted that the Claimant's MRI also showed a ***"giant disk fragment"*** at L5-S1 that was pushing his S1 nerve root and irritating it, and displacing it, and narrowing it and that was causing the Claimant's left leg radicular pain (Weiss Depo, p. 38, LI. 5-25); and,

(b) Paragraph No. 9 should be amended to accurately reflect the evidence that the Claimant was not just complaining of low back pain which is common in the general population when he began seeking treatment for his lumbar spine occupational disease in December of 2007. The Claimant presented to Dr. Ranck on 12-12-2007 complaining of radicular symptoms in his left leg including, but not limited to, ***"cramping from left buttocks [sic] [buttocks] and knee"*** (Bates No. 005001).

(9) **An ORDER ON RECONSIDERATION** amending paragraph No. 10 in the following particulars:

(a) Paragraph 10 should be amended to accurately reflect that Dr. Weiss may have the academic credentials to be qualified to testify that there is ***"no connection between Claimant's need for back surgery and his employment"*** but he is not competent as a fact witness to give such testimony because Dr. Weiss admitted under oath during his 1/27/09 post-hearing deposition that he did not review the

Claimant's job description set forth in Exhibit No. 3, he did not ask the Claimant any questions about his job activities during his 10/1/08 IME examination of the Claimant and he did not review the Claimant's hearing testimony describing his job duties before issuing his 10/1/08 IME report and before he testified during his 1/27/09 post-hearing deposition.

(b) Paragraph No. 10 should also be amended to accurately reflect the evidence that Dr. Weiss conceded much more than just heavy materials handling and sedentary work can be associated with chronic back pain during his January 27, 2009 post-hearing deposition. Dr. Weiss also made the following **critically important admissions** and concessions during his 1/27/09 post-hearing deposition:

(1) Dr. Weiss admitted during his January 27, 2009 post-hearing deposition that employer / surety in this case did not provide him with any contrary evidence to refute the **Claimant's unrefuted description of the particular hazards of his job** as set forth in his written job description and his 12/19/08 hearing testimony including, but not limited to, the evidence presented by Claimant which proved that his Sawyer / Assembler job required him to engage in certain body postures and activities which, according to Dr. Weiss, are known to cause high impact to the back and significantly increase the pressure placed on the intervertebral discs in the low back; i.e., ***repetitively lift, twist and bend at the waist*** (Weiss Depo, p. 50, L. 10- p. 52, L. 19).

(2) Dr. Weiss admitted under oath during his post-hearing deposition that ***combined bending, twisting and lifting activities*** at any level do not just aggravate back pain, but can actually ***cause impact activity to the back*** (Weiss Depo, p. 64, LI. 19-21).

(3) Dr. Weiss admitted under oath during his post-hearing deposition that ***"if you bend, twist, and lift, what you're doing is you're putting increased pressure on one of the disks"*** as opposed to using both of them, so that's going to increase it right there. And ***you're also increasing pressure on just part of the disk, instead of using the whole disk*** (Weiss Depo, p. 66, LI. 16-21).

(4) Dr. Weiss admitted under oath during his post-hearing deposition that the combined movement of ***lifting while bending forward*** at the waist would ***increase the load or pressure on the person's intervertebral disks*** (Weiss Depo, p. 67, LI. 13-17).

(5) Dr. Weiss admitted under oath during his post-hearing deposition that ***there is a relationship between certain body postures and activities and intradiscal pressure*** (Weiss Depo, p. 62, LI. 15-17).

(6) Dr. Weiss admitted under oath during his post-hearing deposition that L5-S1 disc herniations (like the one suffered by Claimant in November of 2007) were the most common type of disc herniations (Weiss Depo., p. 59, LI. 9-14), and,

(7) Dr. Weiss admitted that in cases where a disc herniation is present, the person's doctor would limit the person from things that cause impact activity to the back, which are combined bending, twisting and lifting activity at any level (Weiss Depo, p. 64, LI. 19-21).

(10) An ORDER ON RECONSIDERATION amending paragraph No. 11 in the following particulars:

(a) Paragraph 11 should be amended to accurately reflect that there is no evidence before the Commission to support Dr. Weiss's testimony or the Commission's conclusion that Claimant's lumbar spine occupational disease was more likely due to the non-industrial factors of "heredity", "age", "diet", "smoking" or "obesity". In fact, Dr. Weiss admitted during his January 27, 2009 deposition that if a person were exposed to the hazards of repetitive heavy lifting, twisting and bending activities in awkward body postures, such exposure to those activities in awkward body postures would cause high impact activity to the back and would put increased pressure on intervertebral discs.

(b) Paragraph No. 11 should also be amended to accurately reflect the evidence that the Industrial Commission did not give the Claimant proper written notice that the Nelson defense would be a disputed issue that would be heard and decided at the December 19, 2008 Hearing in direct violation of Idaho Code §72-713;

(c) Paragraph No. 11 should also be amended to accurately reflect the evidence that the Defendants expressly waived the Nelson defense on the record at the beginning December 19, 2008 Hearing;

(d) Paragraph No. 11 should also be amended to accurately reflect the evidence that the Defendants failed to meet their burden of proving the Nelson defense at the December 19, 2008 Hearing.

(e) Paragraph No. 11 should also be amended to accurately reflect the law that the Claimant is not required to disprove applicability of the Nelson defense as an element in his prima facie case for a compensable occupational disease claim.

(f) Paragraph No. 11 should also be amended to accurately reflect that there is no evidence before the Commission which proves that the Claimant suffered any kind pre-existing injury to his low back before he went to work for Joslin Millwork on September 13, 2005 which caused him to develop the

lingering effects, weaknesses or susceptibilities in his lumbar spine that were medically documented and verified by a medical provider and described as degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1. Therefore, based on the Supreme Court's holding in Dernain v. Bruce McLaughlin Logging, 132 Idaho 782, 979 P.2d 655 (1999) and Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005), the Nelson defense cannot be applied as a matter of law in to preclude recovery of the Claimant's lumbar spine occupational disease claim.

(g) Paragraph No. 11 should also be amended to accurately reflect the evidence that when the Claimant went to a Chiropractor on 2 occasions in December of 2005, his generic complaints of low back pain were not caused by an injury to his low back. Therefore, based on the Supreme Court's holding in Dernain v. Bruce McLaughlin Logging, 132 Idaho 782, 979 P.2d 655 (1999) and Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005), the Nelson defense cannot be applied as a matter of law in to preclude recovery of the Claimant's lumbar spine occupational disease claim;

(h) Paragraph No. 11 should also be amended to accurately reflect the evidence that when the Claimant went to a Chiropractor on 2 occasions in December of 2005, his chiropractor did not diagnose him with the lingering effects of a back injury and tell him that he suffered from degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1. Therefore, based on the Supreme Court's holding in Dernain v. Bruce McLaughlin Logging, 132 Idaho 782, 979 P.2d 655 (1999) and Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005), the Nelson defense cannot be applied as a matter of law in to preclude recovery of the Claimant's lumbar spine occupational disease claim;

(i) Paragraph No. 11 should also be amended to accurately reflect that there is no evidence before the Commission which proves that the Claimant was involved in any kind of injury to his low back after his first date of employment with Joslin Millwork on September 13, 2005 but before he developed low back and left leg cramping sensations in November of 2007 which resulted in a medical provider telling him that he was suffering from lingering effects of a back injury that had developed into degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1. Therefore, based on the Supreme Court's holding in Dernain v. Bruce McLaughlin Logging, 132 Idaho 782,

979 P.2d 655 (1999) and Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005), the Nelson defense cannot be applied as a matter of law in to preclude recovery of the Claimant's lumbar spine occupational disease claim

(j) Paragraph No. 11 should also be amended to accurately reflect that there is no evidence before the Commission which proves that the Claimant suffered from any **preexisting lumbar spine occupational disease** that had already **"manifested itself" before** the Claimant went to work for Joslin Millwork on September 13, 2005. Therefore, based on the Supreme Court's holding in Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005), the Nelson defense cannot be applied as a matter of law in to preclude recovery of the Claimant's lumbar spine occupational disease claim;

(k) Paragraph No. 11 should also be amended to accurately reflect the evidence that the Claimant's December 13, 2005 lumbar spine X-Ray proves that his lumbar spine was completely **"negative for pathology"** on December 13, 2005 (Bates No. 013003) and that Dr. Meissner told that Claimant that ***"there was nothing wrong"*** with his lumbar spine on December 13, 2005 (Tr., p. 19, L. 21 – p. 20, L. 5);

(l) Paragraph No. 11 should also be amended to accurately reflect the evidence that **after** the Claimant's lumbar spine X-Ray on 12/13/05, the Claimant ***developed degenerative changes*** in his lumbar spine over the next 25 months which were described in his 1/23/08 MRI report as follows:

IMPRESSION: There is a moderate sized left paracentral disk herniation at L5-S1 with an extruded fragment which may be a free fragment extending down into the left lateral recess dorsal to the SI vertebral body resulting in severe left lateral recess stenosis and displacement of the traversing left SI nerve root posteriorly. There is no central canal stenosis.

There is advanced degenerative disk disease at L5-S1 with mild left neural foraminal stenosis secondary to loss of disk space height and eccentric disk bulge. There is moderate to severe left L4-S and mild-moderate bilateral LS-SI facet joint arthropathy. (Bates No. 009001-009002).

(m) Paragraph No. 11 should also be amended to accurately reflect the evidence that the Claimant did **not** participate in any other activities outside of work that would likely cause damage to his lumbar spine. In fact, the evidence in this case shows that the Claimant denied participating in gardening activities, home woodworking, racket sports, bicycle riding, weight lifting, golfing, home auto repair, aerobics, volleyball, archery, playing musical instruments, martial arts, bowling, softball, baseball, basketball, football, water skiing, snow skiing, motorcycle riding, 4 X 4 wheeling, or 3-wheeling (Bates No. 004019 – 004021). The

unrefuted evidence in this case proves that the Claimant did not engage in any physical activities or body postures outside of work that would be a more likely cause of his lumbar spine occupational disease.

(n) Paragraph No. 11 should also be amended to accurately reflect that there is no evidence before the Commission which proves that any of the Claimant's ancestors suffered from degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1. Therefore, there is no substantial or competent evidence before the Commission to support Dr. Weiss' testimony or the Commission's finding that "**heredity**" caused the Claimant's lumbar spine degenerative disease;

(o) Paragraph No. 11 should also be amended to accurately reflect that Claimant started working at Joslin Millwork when he was only 28 years old and first noticed his radicular symptoms of left buttock cramping that radiated down his left leg to his knee in November of 2007 when he was just 30 years old. Given the Claimant's relative youth when his lumbar spine occupational disease became symptomatic in November of 2007, there is no evidence before the Industrial Commission to support Dr. Weiss' testimony or the Commission's finding that the Claimant's "**age**" caused his degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1;

(p) Paragraph No. 11 should also be amended to accurately reflect that there is no evidence before the Industrial Commission to support Dr. Weiss' testimony or the Commission's finding that the Claimant followed some kind of unusual "**diet**" that would have caused his degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1;

(q) Paragraph No. 11 should also be amended to accurately reflect that there is no evidence before the Industrial Commission to support Dr. Weiss' testimony or the Commission's finding that "**smoking**" would have caused the Claimant's degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1 (Bates No. 005002);

(r) Paragraph No. 11 should also be amended to accurately reflect that there is no evidence before the Industrial Commission to support Dr. Weiss' testimony or the Commission's finding that "**obesity**" would have caused the Claimant's degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1 because there is no evidence before the Commission that the Claimant was "obese". In fact, the Claimant was described by his doctor at St.

Alphonsus RMC as "physically fit" on 01/04/2008 and the Referee had the opportunity to observe the Claimant at the 12/19/08 Hearing and knows that Claimant is not obese (Bates No. 006001); and,

(s) Paragraph No. 11 should be amended to accurately reflect the overwhelming evidence in this case that the Claimant was exposed to the very specific and ***particular hazards of repetitive heavy lifting, twisting and bending activities*** while working in relatively static and awkward positions at the **beam saw machine** and production floor parts cart over an 18-month period from mid-2006 to November of 2007. The Claimant's exposure to the ***particular hazards*** described in Exhibit 3 over an 18-month period did not aggravate or speed the progression of a pre-existing lumbar spine condition because there is no evidence before the Commission to **medically document and verify** the existence a pre-existing lumbar spine degenerative condition. The overwhelming evidence in this case establishes that the Claimant's exposure to these unique hazards was more-likely-than-not the actual cause of the Claimant's degenerative disc disease, facet arthritis, degenerative joint disease, arthritis and resulting L5-S1 disc herniation with extruded fragment as established by the ***consensus of medical opinion*** from the Claimant's attending physicians, James Bates, M.D. and R. Tyler Frizzell, M.D., and by the sworn admissions made by the Defendants' IME medical expert during his post-hearing deposition. Therefore, the Claimant has met his burden of proving that he contracted / incurred his lumbar spine occupational disease as a Sawyer / Assembler for Joslin Millwork.

(11) **An ORDER OF ERRATUM** changing paragraph No. 11 to accurately reflect that there is absolutely no evidence before the Commission which proves that the Claimant complained to a another employer that he hoped to get out of the drywall business because it was causing him low back pain.

(12) **An ORDER OF ERRATUM** changing paragraph 12 to accurately reflect that the Claimant in Flores v. Boise Cascade, 2008 IIC 0420 (2008) did not suffer a "low back injury" but rather was found to have contracted / incurred a compensable lumbar spine occupational disease as the result of exposure to hazards of repetitive lifting, bending and twisting based on ***the consensus of medical opinion***.

(13) **An ORDER ON RECONSIDERATION** amending Paragraph No. 12 in the following particulars:

(a) Paragraph No. 12 should be amended to accurately reflect and specifically detail the closely analogous similarities between the facts in this case and the facts in Flores v. Boise Cascade, 2008 IIC 0420 (2008) which compel the same conclusion that he Claimant in this case has met his burden of proving

a compensable lumbar spine occupational disease claim. To the extent that the facts in this case are distinguishable from the facts in Flores, those distinctions should be resolved in favor of awarding the Claimant in this case benefits because he was not 60 years old when his lumbar spine degenerative disease manifested itself and he did not have a prior disc herniation and a prior disc surgery at the same level of his lumbar spine like the Claimant in Flores.

(b) Paragraph 12 should be amended to accurately reflect the proposition for which the Claimant cited Wilz v. Subway, 2001, IIC 0867 (2001); i.e., that occupational disease proceedings before the Industrial Commission are supposed to be summary, economical and simple. The Claimant is not required to hire multiple experts in order to prove the causation issue of whether his disease was contracted / incurred in his employment. In Wilz, the Commission rejected the employer / surety' hyper-technical approach to proving causation that required the record to become over-burdened with multiple experts in favor of a **"common sense"** approach.

(14) **An ORDER ON RECONSIDERATION** which amends Paragraph No. 13 in the following particulars:

(a) Paragraph 13 should be amended to accurately reflect the evidence that the Claimant presented an unrefuted job description evidence and gave unrefuted hearing testimony which established that he **"repeatedly"** engaged in work activities that are known to cause high impact to the back and significantly increase intradiscal pressure in the intervertebral discs of the low back.

During a standard 8.0 hour work shift, I will lift, carry, twist, turn, bend at the waist, push and pull these laminate sheets approximately 6 out of every 8 hours or 75% to 80% of the time. As part of the production cycle, **I am required to perform these physical movements repeatedly at a very fast pace** (i.e., as fast as the saw will cut the product and as fast as I can move my body while lifting and carrying these heavy sheets of laminate)" (Exhibit No. 3).

The word "repeatedly" is the functional equivalent of the word "constant". Therefore, just like the Claimant in Flores was awarded benefits for his lumbar spine occupational disease based on the **consensus of medical opinion**, the Claimant in this case should be awarded benefits because he met his burden of proving that his job exposed him to the particular hazards of degenerative disc disease which were characteristic of and peculiar to his job and distinguishable from the general run of occupations; and,

(b) Paragraph 13 should be amended to accurately reflect the proposition for which the Claimant cited

Wilz v. Subway, 2001, IIC 0867 (2001); i.e., that occupational disease proceedings before the Industrial Commission are supposed to be summary, economical and simple. The Claimant is not required to hire multiple experts in order to prove the causation issue of whether his disease was contracted / incurred in his employment. In Wilz, the Commission rejected the employer / surety's argument that multiple experts are required in occupational disease claims in favor of a "**common sense**" approach to proving causation.

(15) An ORDER ON RECONSIDERATION which amends Paragraph No. 14 in the following particulars:

(a) Paragraph 14 should be amended to accurately reflect the evidence that the Claimant met his burden of proving that the hazards of his Sawyer / Assembler job exposed him to risks which were characteristic of and peculiar to his job and distinguishable from the general run of occupations because there is no evidence before the Commission to support the conclusion that:

(1) The general run of manual labor occupations require the worker to stand in a relatively static position in a confined 5 X 7 foot space between the beam saw machine, a forklift, and a unit stack of 4 X 8 sheets of particle board;

(2) The general run of manual labor occupations require the worker to reach out away from his body and manually grab and lift between 30 and 50 sheets of particle board 4 X 8 in dimension with a total weight between 4,500 and 7,500 pounds off of a unit stack during 6.0 hours out of every 8.0 hour work shift (i.e., 75% to 80% of the time);

(3) The general run of manual labor occupations require the worker to lift 150 pounds of raw materials and then repetitively twist / turn 180 degrees at the waist in order to place each sheet of particle board on the bed of the beam saw machine that the worker was operating;

(4) The general run of manual labor occupations require the worker to perform all of these repetitive heavy lifting, twisting and turning activities at the moderate-to-fast pace of the production cycle; and,

(5) The general run of manual labor occupation require the worker to perform all of these repetitive heavy lifting, twisting and turning activities repetitively for 6.0 hours out of every 8.0 hour work shift.

(b) Paragraph 14 should be amended to accurately reflect that this case is nothing like Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996). In Ogden, the Claimant failed to meet his burden of proving that the hazards of his disease were characteristic of his job because he "**failed to present sufficient**

evidence regarding the particular hazards of his job as a shop manager to justify a finding that he

contracted an occupational disease". *Id.* at 128 Idaho 90, 910 P. 2d 762 (1996) (emphasis supplied).

Whereas, the Claimant in this case presented detailed and unrefuted evidence about the particular

hazards of his job in the form of a detailed Job Description (Exhibit No. 3) and detailed sworn testimony at

Hearing (Tr., p. 22, L. 13 – p. 36, L. 5);

(c) Paragraph 14 should be amended to accurately reflect the unrefuted evidence in this case

establishes that the Claimant worked as a Sawyer which required him to operate a specialized piece of

machinery on the production floor known as the beam saw for 75% to 80% of every 8.0 hour work shift.

The unrefuted evidence in this case also establishes that the Claimant was required to load and un-load

cut pieces of particle board onto a parts cart on the production floor while lifting, carrying, bending over

at the waist, pushing, and shoving while extending his right leg out to place his right foot behind the wheel

of the cart to act as a brake. Finally, the unrefuted evidence in this case establishes that the operation of

the beam saw machine was implicated in causing the Claimant's lumbar spine occupational disease.

(d) Paragraph 14 should be amended to accurately reflect the unrefuted evidence in this case that

the Claimant was exposed to particular hazards that required "constant repetitive activity" and the

performance of those constant repetitive activities were clearly implicated in causing his lumbar spine

occupational disease.

During a standard 8.0 hour work shift, I will lift, carry, twist, turn, bend at the waist, push and pull these laminate sheets approximately 6 out of every 8 hours or 75% to 80% of the time. As part of the production cycle, I am required to perform these physical movements repeatedly at a very fast pace (i.e., as fast as the saw will cut the product and as fast as I can move my body while lifting and carrying these heavy sheets of laminate) (Exhibit No. 3).

(e) Paragraph 14 should be amended to accurately reflect the overwhelming evidence in this case

that the Claimant met his burden of proving exposure to particular hazards which were characteristic of

and peculiar to his job which caused his lumbar spine occupational disease and resulted in the need for

back surgery.

(16) An ORDER ON RECONSIDERATION amending paragraph 15 to accurately reflect the evidence

in this case that the Claimant is afflicted with a compensable occupational disease and the Defendants are

liable for all medical benefits necessary to properly treat that disease.

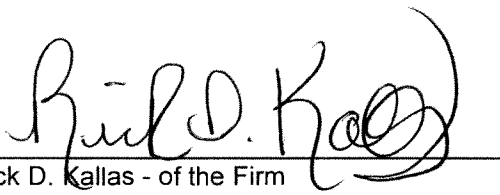
(17) An ORDER ON RECONSIDERATION amending paragraph 16 to accurately reflect that the

Defendants are liable for all medical benefits incurred by Claimant in connection with his lumbar spine occupational disease and must pay Claimant total temporary disability benefits during his period of recovery from his occupational disease.

(18) **An ORDER ON RECONSIDERATION** which amends Orders No. 1 – 3 of the Commission's June 8, 2009 decision to reflect the corrections and amendments requested in this Motion For Correction of Erratum and Motion For Reconsideration.

RESPECTFULLY SUBMITTED this 26th day of June, 2009.

Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.

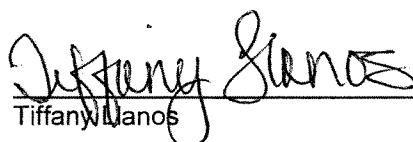
By 
Rick D. Kallas - of the Firm
Attorneys for Claimant

Certificate of Service

I HEREBY CERTIFY that on the 26th day of June, 2009, I served Claimant's Motion For Correction of Erratum and Motion For Reconsideration by the method indicated below and addressed to the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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ROBERT A. WATSON,

Claimant,

vs.

JOSLIN MILLWORK, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Surety,
Defendants.

I.C. No. 2008-017579

CLAIMANT'S BRIEF IN SUPPORT OF
MOTION FOR CORRECTION OF ERRATUM
AND CLAIMANT'S MOTION FOR
RECONSIDERATION OF JUNE 8, 2009
DECISION

COMES NOW, Claimant, Robert A. Watson, by and through his attorney, Rick D. Kallas, of Ellsworth, Kallas, Talboy and DeFranco, PLLC, and hereby submits this Brief In Support of Claimant's Motion For Correction of Erratum and Motion For Reconsideration of June 8, 2009 Decision:

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(I) INTRODUCTION

The Industrial Commission entered its Findings of Fact, Conclusions of Law and Recommendation and Order on June 8, 2009. In its decision, the Industrial Commission held that the Claimant's occupational disease claim was not compensable on the following grounds:

1. The Claimant failed to prove that his lumbar spine occupational disease was contracted / incurred in his job as a Sawyer / Assembler / Cabinet Maker / Delivery Driver for Joslin Millwork (See ¶ 11 of 06/08/2009 decision);
2. Nelson and its progeny preclude recovery because the Claimant was not involved in a new accident (See ¶ 11 of 06/08/2009 decision); and,
3. The hazards of the Claimant's job which required him to engage in repetitive heavy lifting, twisting and bending were not characteristic of and peculiar to his Sawyer / Assembler job (See ¶ 13 – 14 of 06/08/2009 decision).

The Claimant has filed a Motion For Correction of Erratum and Motion For Reconsideration in an effort to correct the errors in the Commission's decision and in an effort to convince the Commission to enter an Order On Reconsideration which concludes that the Claimant met his burden of proving each element in the prima facie case for a compensable lumbar spine occupational disease claim. The arguments below will address the Commission's holdings in the order in which the issues were addressed in the Commission's June 8, 2009 decision (i.e., contracted / incurred followed by Nelson and ending with characteristic of and peculiar to).

(II) ARGUMENT

(1) THE COMMISSION ERRED WHEN IT CONCLUDED THAT THE CLAIMANT FAILED TO PROVE THAT HIS LUMBAR SPINE OCCUPATIONAL DISEASE WAS CONTRACTED / INCURRED IN HIS SAWYER / ASSEMBLER JOB AT JOSLIN MILLWORK

A. THE COMMISSION ERRED BY OVERLOOKING CRITICAL EVIDENCE WHICH PROVED THAT THE CLAIMANT CONTRACTED / INCURRED HIS LUMBAR SPINE OCCUPATIONAL DISEASE IN HIS SAWYER / ASSEMBLER JOB AT JOSLIN MILLWORK

The Commission erred when it concluded in paragraph 7 on page 6 of its June 8, 2009 decision that the only “**proof**” the Claimant presented to the Industrial Commission in order to prove that he had contracted / incurred a compensable lumbar spine occupational disease at Joslin Millwork consisted of the Claimant's 4/29/08 prima facie case letter to Dr. Frizzell and Dr. Frizzell's 5/5/08 response thereto (See ¶ 7).

The Claimant actually presented overwhelming evidence which proved that Claimant's lumbar spine occupational disease was contracted / incurred in his Sawyer / Assembler job at Joslin Millwork including, but not limited to the following:

- (1) Claimant's Hearing Exhibits 1 – 14.
- (2) The Claimant's April 29, 2008 prima facie case occupational disease letter to Dr. Frizzell with Exhibits A – D (Bates No. 008010 – 008038).
- (3) Dr. Frizzell's May 5, 2008 response to Claimant's prima facie case letter (Bates No. 008039-008040).
- (4) Dr. Frizzell's October 30, 2008 letter to Claimant's counsel confirming that his medical causation opinions were not changed by the analysis and / or opinions in Dr. Weiss' October 1, 2008 IME report (Bates No. 008041 – 008042).
- (5) Dr. Bates' December 4, 2008 letter to Claimant's counsel (Bates No. 007016).
- (6) The Claimant's unrefuted December 19, 2008 Hearing testimony.
- (7) The Claimant's May 16, 2008 recorded statement to Surety's investigator which proved that the Claimant **ruled out every other potential cause** for his lumbar spine degenerative disc disease and resulting L5-S1 disc herniation when he denied that he participated in gardening activities, home woodworking, racket sports, bicycle riding, weight lifting, golfing, home auto repair, aerobics, volleyball, archery, playing musical instruments, martial arts, bowling, softball, baseball, basketball, football, water skiing, snow skiing, motorcycle riding, 4 X 4 wheeling, or 3-wheeling (Bates No. 004019 – 004021). Other than his work activities at Joslin Millwork, the Claimant did not engage in any physical activity that is known to cause lumbar spine disease (See pp. 7-8 of Claimant's May 7, 2009 Post-Hearing Reply Brief).

and,

- (8) Key admissions made by the Defendants' IME physician, Michael S. Weiss, M.D., during his January 27, 2009 post-hearing deposition which prove a cause and effect relationship between the hazards of Claimant's work activities and his lumbar spine disc disease including, but not limited to the following:
 - (a) Dr. Weiss's admission that employer / surety did not provide him with any evidence to refute the Claimant's testimony that his job required him to engage in certain body postures and activities which are known to **cause high impact** to the back and significantly increase intradiscal pressure; i.e., **repetitively lift, twist and bend at the waist** (Weiss Depo, p. 50, L. 10- p. 52, L. 19).
 - (a) Dr. Weiss's admission that **combined bending, twisting and lifting activities** at any level do not just aggravate back pain, but can actually **cause impact activity to the back** (Weiss Depo, p. 64, LI. 19-21).
 - (c) Dr. Weiss's admission that **"if you bend, twist, and lift, what you're doing is you're putting increased pressure on one of the disks** as opposed to using both of them, so that's going to increase it right there. And **you're also increasing pressure on just part of the disk, instead of using the whole disk** (Weiss Depo, p. 66, LI. 16-21).
 - (d) Dr. Weiss's admission that the combined movement of **lifting while bending forward** at the waist would **increase the load or pressure on the person's intervertebral disks** (Weiss Depo, p. 67, LI. 13-17).
 - (e) Dr. Weiss's admission that **there is a relationship between certain body postures and**

activities and intradiscal pressure (Weiss Depo, p. 62, LI. 15-17).

- (f) Dr. Weiss's admission that L5-S1 disc herniations (like the one suffered by Claimant in November of 2007) were the most common type of disc herniations (Weiss Depo., p. 59, LI. 9-14), and,
- (g) Dr. Weiss's admission that in cases where a disc herniation is present, the person's doctor would limit the person from things that cause impact activity to the back, which are combined bending, twisting and lifting activity at any level (Weiss Depo, p. 64, LI. 19-21).

Given the overwhelming amount of evidence that the Claimant presented to the Commission to prove that his lumbar spine occupational disease was contracted / incurred in his Sawyer / Assembler / Cabinet Maker job at Joslin Millwork, it was error for the Commission to conclude that Claimant's causation "**proof**" was limited to only his 4/29/08 occupational disease letter to Dr. Frizzell and Dr. Frizzell's 5/5/08 response thereto. Even the Defendants were willing to concede that the Claimant had met his burden of proof based only on Dr. Frizzell's 5/5/08 prima facie case letter:

"At best, with the opinion of Dr. Frizzell, Claimant has met his prima facia [sic] [facie] case / burden of proof" (Def. Resp. Br., p. 13).

On Reconsideration, the Commission should amend paragraph 11 of its June 8, 2009 decision and conclude that the medical opinions from Dr. Frizzell and Dr. Bates and the critical admissions made by Dr. Weiss during his January 27, 2009 post-hearing deposition were sufficient to allow the Claimant to meet his burden of proving that his lumbar spine occupational disease was contracted / incurred in his job as a Sawyer / Assembler / Cabinet Maker for Joslin Millwork:

This Court has held that ***no special verbal formula is necessary*** when a doctor's testimony plainly and unequivocally conveys his conviction that events are causally related. *Jensen*, 135 Idaho at 412-13, 18 P.3d at 217-18 (citing *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979), overruled on other grounds by *Jones v. Emmett Manor*, 134 Idaho 160, 165, 997 P.2d 621, 625 (2000) (holding that "To the extent *Dean v. Dravo Corp.*, 95 Idaho 558, 511 P.2d 1334 (1973) and *Paulson* . . . **suggest a requirement of oral medical testimony in every case, the suggestion is disavowed.**")). Rather even if a doctor expressly refuses to say the words "reasonable degree of medical probability," it can still be clear from his or her testimony that he or she considers that a claimant's injury ***more likely than not*** was caused by a work related accident. *Jensen*, 135 Idaho at 412, 18 P.3d at 217. *Stevens- McAtee v. Potlatch Corp.*, 145 Idaho 325, 334, 179 P.3d 288, 297 (2008) (emphasis supplied).

B. THE COMMISSION ERRED BY OVERLOOKING THE FINDINGS OF THE CLAIMANT'S IMAGING STUDIES WHICH CONCLUSIVELY PROVE THAT THE CLAIMANT'S LUMBAR SPINE OCCUPATIONAL DISEASE DEVELOPED AFTER THE CLAIMANT WENT TO WORK FOR JOSLIN MILLWORK

Approximately 3 months after starting his new job with Joslin Millwork on 09/13/2005, the Claimant underwent a lumbar spine X-Ray as ordered by Dr. Meissner. This X-Ray is extremely important to proving causation in this case because it shows the pristine condition of the Claimant's lumbar spine before he was exposed to the **hazards of repetitive heavy lifting, bending and twisting in awkward positions** as a Sawyer / Assembler / Cabinet Maker / Delivery Driver for Joslin Millwork beginning in mid-2006.

The objective findings of the Claimant's December 13, 2005 lumbar spine X-Ray prove that his lumbar spine was completely **"negative for pathology"** (Bates No. 013003) 3 months after he went to work for Joslin and 6 months before he transferred to the Sawyer / Assembler / Cabinet Maker position. At the 12/19/08 Hearing, the Claimant gave unrefuted testimony that Dr. Meissner read the film from his lumbar spine X-Ray and then told the Claimant that **"there was nothing wrong"** with his lumbar spine (Tr., p. 19, L. 21 – p. 20, L. 5).

Approximately 6 months after the Claimant's 12/13/2005 lumbar spine X-Ray was taken, the Claimant changed jobs within Joslin and began working exclusively as a Sawyer / Assembler / Cabinet Maker / Delivery Driver (Exhibit No. 3) (Tr., p. 21, L. 24 – p. 22, L. 4). This new job exposed the Claimant to the hazards of repetitive heavy lifting, twisting and bending in awkward positions while the Claimant worked in a confined space of approximately 5 X 7 feet between the beam saw, the forklift and the unit of stacked particle boards. The Claimant was also required to repeatedly bend over at the waist in order to load / un-load the pieces of cut material onto 2 different shelves on the production / parts' cart. (Exhibit No. 3) (Tr., p. 22, L. 8 – p. 36, L. 22).

The Defendants have never disputed that the Claimant's job exposed him to the hazards of repetitive heavy lifting, twisting and bending in awkward positions (See ¶11 on pp. 7 – 8 of June 8, 2009 decision). The Industrial Commission even found that **"[t]o be sure, Claimant's job involved a good deal of heavy lifting, twisting, bending, etc"** (See ¶14 on p. 9 of June 8, 2009 decision).

After being exposed to the hazards of the Sawyer / Assembler job for approximately 19 months, the Claimant underwent an MRI study of his lumbar spine on January 23, 2008. The Claimant's 1/23/08 lumbar spine MRI showed the following **degenerative changes** in his lumbar spine:

IMPRESSION: There is a moderate sized left paracentral disk herniation at L5-S1 with an extruded

fragment which may be a free fragment extending down into the left lateral recess dorsal to the S1 vertebral body resulting in severe left lateral recess stenosis and displacement of the traversing left S1 nerve root posteriorly. There is no central canal stenosis.

There is advanced degenerative disk disease at L5-S1 with mild left neural foraminal stenosis secondary to loss of disk space height and eccentric disk bulge. There is moderate to severe left L4-5 and mild-moderate bilateral L5-S1 facet joint arthropathy. (Bates No. 009001-009002).

Since none of the Claimant's lumbar spine degenerative changes were present on his 12/13/05 X-Ray, those degenerative changes **must have developed after** he started working as a Sawyer / Assembler during the time interval between 12/13/05 - 1/23/08. There is absolutely no evidence before the Commission that the Claimant suffered any kind of injury to his low back during this time period. If the Claimant did not suffer any kind of injury to his low back during this time interval, that would obviously make it ***more-likely-than-not*** that the Claimant's exposure to the hazards of repetitive heavy lifting, twisting and bending in awkward positions as a Sawyer / Assembler for Joslin Millwork caused his lumbar spine disease. This conclusion is made even stronger by the evidence that the Claimant did not engage in any other physical activities outside of work which could be implicated in the cause of his lumbar spine occupational disease. In the absence of any other plausible explanation for the development of the Claimant's lumbar spine disease in the time period 12/13/05 – 1/23/08, it was error for the Commission to conclude that the Claimant had not met his burden of proving that his disease was contracted / incurred in his employment with Joslin Millwork.

C. **THE COMMISSION ERRED BY CONCLUDING THAT REPETITIVE HEAVY LIFTING, TWISTING AND BENDING ACTIVITIES IN AWKWARD POSITIONS CAN AGGRAVATE OR SPEED THE PROGRESSION OF A LUMBAR SPINE DISEASE BUT THOSE SAME HAZARDS CANNOT CAUSE THE DISEASE IN THE FIRST PLACE**

The Commission conceded in its June 8, 2009 decision that "[i]t would be reasonable to conclude that Claimant's heavy / repetitive work activities (***with which Defendants do not disagree***) ***may have speeded the progression of his underlying disease***" (See ¶11 of 06/08/2009 decision). However, after making that concession, the Commission refused to take the next logical step and find that the Claimant's heavy / repetitive work activities were actually ***"implicated in causing Claimant's disease"*** (See ¶14 of 06/08/2009 decision).

The first problem with this hypothesis is that it rests on the faulty premise that the Claimant suffered from a pre-existing and underlying lumbar spine disease. In order for the hazards of repetitive heavy lifting, twisting and bending to **speed the progression** of an underlying disease, there must first be an underlying disease. There is absolutely no evidence before the Commission that the Claimant suffered from a pre-existing and

underlying disease prior to undergoing his 1/23/2008 lumbar spine MRI ¹.

Even if the Claimant had suffered from a pre-existing and underlying lumbar spine disease, it does not make logical sense for the Commission to conclude that the hazards of the Claimant's job could aggravate, accelerate, light up or speed the progression of his underlying disease, but those same hazards could not have the causal power to actually cause the disease. In fact, in Flores v. Boise Cascade, 2008 IIC 0420 (2008), the Industrial Commission adopted the "**consensus of medical opinion**" and found that the Claimant's exposure to repetitive lifting, bending and twisting is what caused his lumbar spine occupational disease.

D. THE COMMISSION SHOULD HAVE FOLLOWED ITS HOLDING IN FLORES WHERE IT ADOPTED THE CONSENSUS MEDICAL OPINION AND CONCLUDED THAT EXPOSURE TO THE HAZARDS OF REPETITIVE LIFTING, BENDING AND TWISTING WERE SUFFICIENT TO CAUSE THE CLAIMANT'S LUMBAR SPINE OCCUPATIONAL DISEASE

The hazards of repetitive heavy lifting, twisting and bending in this case were virtually the same hazards that the Claimant was exposed to in the case of Flores v. Boise Cascade, 2008 IIC 0420 (2008). However, in Flores, the Industrial Commission reached the opposite conclusion and found that the Claimant's lumbar spine occupational disease was contracted / incurred in his employment based on "**the consensus of medical opinion**" from the Claimant's attending orthopaedic surgeon and 2 IME experts hired by employer / surety:

The consensus of medical opinion is that the bending, lifting, and twisting activities of Claimant's work were implicated in causing his degenerative disc disease and disc herniation. Flores, supra at p. 19 (emphasis supplied).

The first doctor who rendered a causation opinion in Flores was the Claimant's attending orthopedic surgeon, Joseph M. Verska, M.D. Dr. Verska explained the causal relationship between the Claimant's performance of repetitive bending, lifting and twisting activities and his lumbar spine disc disease as follows:

I think on a more probable than not basis his current symptoms and his disc herniation at L4-5 on the left are related to his work in that he has to do repetitive bending, lifting and twisting primarily on the left. Although this gentleman does not have a specific traumatic episode, trip and fall, or a classic identifying injury I think this represents a repetitive injury to his low back. Flores, supra, at p. 9 (emphasis supplied).

The Defendants in Flores hired Physiatrist Christian Gussner, M.D. and Neurological Surgeon, R. Tyler Frizzell, M.D. as their IME medical experts. Although Dr. Frizzell was the Defendants' IME expert in Flores, he is the Claimant's attending neurological surgeon in this case. Regardless of whether Dr. Frizzell is providing

¹ The findings on the Claimant's 1/23/08 MRI represent primary evidence of the Claimant's lumbar spine occupational disease. The Commission erred by concluding that evidence of this disease proves the existence of a non-existent pre-existing disease. See discussion of the Nelson defense, *infra*, at pp. 19-22.

medical causation opinions as an IME expert for employer / surety or as the Claimant's attending physician, his medical causation opinions about the cause of lumbar spine occupational diseases have not changed from case to case.

Dr. Frizzell opined in both this case and in Flores that the performance of repetitive lifting, twisting and bending activities at work can result in the development of lumbar spine degenerative disc disease and cause a herniated disc. It seems paradoxical that the Industrial Commission would adopt Dr. Frizzell's IME causation opinion in Flores and find a compensable lumbar spine occupational disease claim, but then reject Dr. Frizzell's occupational disease opinions in this case even though they were based on the Claimant being exposed to the same hazards of repetitive lifting, bending and twisting at the waist.

When IME medical experts Dr. Frizzell and Dr. Gussner agreed with Dr. Verska, they rendered the following causation opinion:

Claimant's work as the slitter operator probably contributed the most to Claimant's second lumbar herniation, and the **continuous lifting and twisting that this job required was not comparable to manual labor work** in general. See Flores at p. 13 (emphasis supplied).

Unlike the Claimant in this case, the Claimant in Flores had already suffered a prior disc herniation on the right at L4-5 and had already undergone a prior back surgery on the right side at L4-5 in July of 2000. In spite of clear evidence that the Claimant had suffered a prior injury or disease ***at exactly the same L4-5 level in his lumbar spine that resulted in the need for a prior back surgery***, Dr. Verska, Dr. Gussner and Dr. Frizzell all agreed that the repetitive lifting, twisting and bending of the Claimant's job caused a ***new lumbar spine occupational disease*** at L4-5 on the left side. The Industrial Commission ***agreed with the consensus of medical opinion*** in Flores and found that the Claimant had met his burden of proving that his new left-sided lumbar spine occupational disease at L4-5 was contracted / incurred as the result of his exposure to the hazards of repetitive bending, lifting and twisting.

The Claimant in this case does not have any prior low back injuries or low back diseases. The Claimant in this case has never had surgery on his L5-S1 disc before. The Claimant in this case has a base-line lumbar spine X-Ray on 12/13/05 that proves his lumbar spine was ***"negative for pathology"*** when he went to work for Joslin. Therefore, it is really difficult to conceive of any logical rationale for the Industrial Commission to conclude that the Claimant in this case is not entitled to worker's compensation benefits, while the Claimant in Flores was awarded full compensation for his lumbar spine occupational disease. The facts in these 2 cases

may be slightly distinguishable, but those distinctions should be drawn in favor of awarding compensation to the

Claimant in this case.

The Claimant in this case was only 30-years-old when his disease became symptomatic in November of 2007. Given his relative youth, age should not be treated by the Commission as a serious risk factor for the development of degenerative disk disease in this case. Whereas, age was a major risk factor for the development of degenerative disc disease for the Claimant in Flores because he was approximately 60-years-old when his lumbar spine occupational disease caused his left lower extremity radiculopathy. If the Claimant in Flores was entitled to worker's compensation benefits for his lumbar spine occupational disease, the Claimant in this case most certainly is.

On Reconsideration, the Industrial Commission should reach the same conclusion in this case that it did in Flores and find that the Claimant contracted / incurred his occupational disease as the result of his exposure to the hazards of repetitive heavy lifting, twisting and bending at the beam saw and parts cart in his job as a Sawyer / Assembler for Joslin Millwork.

E. THE INDUSTRIAL COMMISSION ERRED BY OVERLOOKING THE INCURABLE DEFECTS IN THE FOUNDATION FOR DR. WEISS'S MEDICAL CAUSATION OPINIONS

After the Claimant presented the Defendants with Dr. Frizzell's 5/5/08 occupational disease letter which addressed each of the 5 elements in the prima facie case for an occupational disease claim, the Defendants failed and / or refused to authorize the L5-S1 surgery recommended by Dr. Frizzell. On June 11, 2008, the Claimant filed his Complaint with the Industrial Commission. The Defendants did not have the Claimant undergo an Independent Medical Examination (IME) with Physiatrist, Michael S. Weiss, M.D. until October 1, 2008. From the date when they received notice of the Claimant's May 8, 2008 occupational disease claim until October 1, 2008, the Defendants *did not have any medical opinion* to support their DENIAL.

The Defendants' IME physician Michael Weiss, M.D. testified at his January 27, 2009 post-hearing deposition that on a more probable than not basis Mr. Watson's lumbar spine occupational disease was "not related" to his work activities as a Sawyer / Assembler / Cabinet Maker for Joslin Millwork (Weiss depo, p. 30, Ll. 11 – 23). In rejecting the Claimant's occupational disease claim, the Industrial Commission adopted Dr. Weiss's

ultimate medical causation opinion while completely overlooking the critical admissions that Dr. Weiss made on

cross-examination²:

The Referee is persuaded by Dr. Weiss's observations. He has the credentials to render a well-reasoned expert opinion. ... According to Dr. Weiss, degenerative disc disease may be caused by many factors including heredity, aging, diet, smoking and obesity. (See ¶ 11 of 06/08/2009 decision).

Dr. Weiss may have the academic credentials to render well-reasoned expert opinion, but the Commission erred by characterizing his medical causation opinions in this case as well-reasoned because they were not supported by proper foundation. In her 10/1/08 engagement letter to Dr. Weiss, Defense paralegal Patricia Shosted, listed the five (5) elements in the prima facie case of an occupational disease claim and then asked Dr. Weiss to answer one (1) simple question (Bates No. 014003).

Dr. Weiss did not address any of the 5 elements in the prima facie case for a compensable occupational disease claim when he issued his 10/1/08 IME report and Dr. Weiss did not answer the 1 specific causation question that had been posed to him (Bates No. 014005-014009) when he issued his 10/1/08 IME report. If the Commission would carefully analyze the medical opinions in Dr. Weiss's 10/1/08 IME report, it would discover that there is no factual basis to support the conclusion that Dr. Weiss's opinions were well-reasoned and persuasive.

When Dr. Weiss was asked to explain why he failed to answer the 1 specific causation question that employer / surety had posed to him in his 10/1/08 IME report, Dr. Weiss admitted that he "**may not have answered this directly**" (Weiss depo, p. 43, L. 17 - p. 44, L. 5). Dr. Weiss then attempted to justify his failure to address the important issue of causation directly in his 10/1/08 IME report by stating that he was not an English major (Weiss depo, p. 44, L.4). By any objective standard, IME medical expert opinion that does not address the threshold issue of medical causation can hardly be considered "well-reasoned" and persuasive. When Dr. Weiss was asked to identify all of the records that paralegal Shosted gave to him to review prior to his 10/1/08 IME examination of the Claimant, Dr. Weiss testified "**You know, I actually don't know**" and "**What I'm saying is, I don't know**" (Weiss depo, p. 32, L. 13 and L. 23). If the Defendants' IME medical expert cannot even identify the records which served as the foundation for his IME opinions, the Commission should not give his opinions any weight.

² Among other things, Dr. Weiss admitted that repetitive lifting, bending and twisting postures and activities **cause high impact activity to the back and increase the load or pressure on a person's intervertebral disks**. See admissions made by Dr. Weiss listed in section (ii) (1) (A) (8) (a) - (g) *supra*.

Dr. Weiss admitted under oath in his January 27, 2009 post-hearing deposition that he did not review the Claimant's job description set forth in Exhibit No. 3 before he conducted the Claimant's October 1, 2008 IME examination and issued his 10/1/08 IME report (Weiss Depo, p. 34, LI. 15-22). This admission proves that the Industrial Commission erred when it specifically found in ¶ 9 of its decision that Dr. Weiss had reviewed the Claimant's job description. In fact, the evidence in this case proves exactly the opposite. When the Defendants asked Dr. Weiss to determine if there was a causal relationship between the Claimant's job activities and his lumbar spine disease, Dr. Weiss did not even take the time to read the Claimant's job description. That job description should have been the most important document for Dr. Weiss to review because it described the **particular hazards** of the Claimant's job. This is an incurable defect in the foundation of Dr. Weiss's medical opinion which cannot be overcome. If Dr. Weiss did not review the Claimant's job description before issuing his IME report, by his own admission **he did not know anything about the specific hazards that the Claimant was exposed to as a Sawyer / Assembler**. Expert opinion that is not supported by proper foundation can hardly be considered well-reasoned or persuasive.

Dr. Weiss also admitted under oath during his January 27, 2009 post-hearing deposition that he did not ask the Claimant to describe his work activities at Joslin Millwork at any time while taking the Claimant's history during his 10/1/08 IME examination of the Claimant (Weiss Depo, p. 45, L25 – p. 47, L3). Since Dr. Weiss did not review the Claimant's job description before his 10/1/08 IME examination and did not ask the Claimant any questions about his job activities during his 10/1/08 IME examination, by his own admission **Dr. Weiss did not know anything about the specific hazards that the Claimant was exposed to as a Sawyer / Assembler** when he issued his 10/1/08 IME report. Expert opinion that is not supported by proper foundation can hardly be considered well-reasoned or persuasive.

And finally, Dr. Weiss admitted under oath during his January 27, 2009 post-hearing deposition that he did not review a copy of the December 19, 2008 Hearing transcript which contained the Claimant's testimony describing his job activities at Joslin Millwork before he testified during his January 27, 2009 post-hearing deposition (Weiss Depo, p. 34, LI. 6 – 9). Since Dr. Weiss did not review the Claimant's job description before his 10/1/08 IME examination, did not ask the Claimant any questions about his job activities during his 10/1/08 IME examination and did not review the 12/19/08 Hearing Transcript before testifying at his 1/27/09 post-hearing deposition, by his own admission **Dr. Weiss did not know anything about the specific hazards that**

the Claimant was exposed to as a Sawyer / Assembler when he testified during his 1/27/09 post-hearing deposition. The central issue in this case is causation. The Claimant has alleged and proven that his exposure to particular hazards at Joslin Millwork caused his lumbar spine occupational disease. The Defendants hired Michael Weiss, M.D. to be their IME medical expert. Dr. Weiss admitted under oath that he did not spend even one second reviewing the Claimant's job description, asking the Claimant questions about the particular activities of his job or reviewing the Claimant's sworn hearing testimony describing his job activities before he gave his ultimate opinion that the Claimant's lumbar spine occupational disease was "not related" to the Claimant's job activities. Even though Dr. Weiss does not have any factual foundation for reaching that conclusion, the Industrial Commission found his opinions to be well-reasoned and persuasive. This was clear error. Expert opinion that is not supported by proper foundation does not constitute substantial and competent evidence that a reasonable person would accept in support of a conclusion.

The Commission noted, among other things, that the foundation of the surgeon's opinion was unknown. ... *Polite v. Idaho Department of Transportation and State Insurance Fund*, 126 Idaho 270, 271, 882 P.2d 437, 438 (1994) ...

[T]he Commission concluded that the letter did not contain substantial evidence that was contrary to the presumption that the injury arose out of the employee's employment. In doing so, the Commission stated, among other things, that the "uncertain foundation" for the opinion contained in the letter caused the Commission to conclude that the surgeon's "opinion is not evidence which a reasonable mind would accept to support a Conclusion." ... *Id.* at 272 (emphasis supplied).

The Commission also emphasized Dr. Weiss's generalized statement that degenerative disc disease can be related to many non-work factors in ¶ 11 of its 06/08/2009 decision. There is no substantial or competent evidence before the Commission that any of the Claimant's ancestors suffered from degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1. Therefore, there is no substantial or competent evidence before the Commission to support Dr. Weiss' testimony or the Commission's finding that "heredity" caused the Claimant's lumbar spine degenerative disease.

The Claimant started working at Joslin Millwork when he was only 28 years old and first noticed his left lower extremity radicular symptoms of left buttock cramping that radiated down his left leg to his knee in November of 2007 when he was just 30 years old. Given the Claimant's relative youth when his lumbar spine occupational disease became symptomatic in November of 2007, there is no substantial or competent evidence before the Industrial Commission to support Dr. Weiss' testimony or the Commission's finding that the Claimant's

"age" caused his degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1.

There is no substantial or competent evidence before the Industrial Commission to support Dr. Weiss' testimony or the Commission's finding that the Claimant followed some kind of unusual "**diet**" that would have caused his degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1.

There is no substantial or competent evidence before the Industrial Commission to support Dr. Weiss' testimony or the Commission's finding that "**smoking**" would have caused the Claimant's degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1 (Bates No. 005002).

There is no substantial or competent evidence before the Industrial Commission to support Dr. Weiss' testimony or the Commission's finding that "**obesity**" would have caused the Claimant's degenerative disc disease, facet arthritis, degenerative joint disease, arthritis, or a disc herniation with extruded fragment at L5-S1 because there is no evidence before the Commission that the Claimant was "obese". In fact, the Claimant was described by his doctor at St. Alphonsus RMC as "physically fit" on 01/04/2008 (Bates No. 006001) and the Referee had the opportunity to observe the Claimant in-person at the 12/19/08 Hearing and knows that "**obesity**" did not play any role in the onset of the Claimant's lumbar spine occupational disease.

When the record before the Commission does not contain any evidence to support Dr. Weiss's opinions that "heredity", "age", "diet", "smoking" or "obesity" played any causal role in the onset or development of the Claimant's lumbar spine occupational disease, it was error for the Commission to find Dr. Weiss's opinions persuasive and conclude that Claimant's lumbar spine disc disease was "not related" to his job activities at Joslin Millwork.

(2) **THE COMMISSION ERRED BY HOLDING THAT NELSON AND ITS PROGENY BAR RECOVERY**

A. **THE INDUSTRIAL COMMISSION VIOLATED THE CLAIMANT'S RIGHT TO DUE PROCESS OF LAW BECAUSE IT DID NOT GIVE CLAIMANT WRITTEN NOTICE THAT THE NELSON DEFENSE WOULD BE HEARD AND DECIDED AT THE 12/19/08 HEARING AND THE DEFENDANTS EXPRESSLY WAIVED THE NELSON DEFENSE ON THE RECORD**

Idaho Code §72-713 requires the Industrial Commission to provide the parties with procedural and substantive due process by giving them written notice of the disputed issues that are going to be heard and

decided at hearing:

72-713. NOTICE OF HEARINGS -- SERVICE. The commission shall give at least ten (10) days' **written notice** of the time and place of hearing and **of the issues to be heard**, either by personal service or by registered or certified mail. Service by mail shall be deemed complete when a copy of such notice is deposited in the United States post office, with postage prepaid, addressed to a party at his last known address, as shown in the records and files of the commission. Evidence of service by certificate or affidavit of the person making the same shall be filed with the commission (emphasis supplied).

On August 5, 2008, the Claimant filed his Motion For Emergency Hearing. In his Motion, the Claimant did **not** list the Nelson defense as an issue to be heard and decided by the Industrial Commission. On August 7, 2008, Employer / Surety filed their Objection To Request For Emergency Hearing. In their Objection, Employer / Surety did **not** list the Nelson defense as a disputed issue to be heard and decided at Hearing. On August 25, 2008, the Industrial Commission issued its Order Granting Motion For Emergency Hearing. In its Order, the Industrial Commission did **not** list the Nelson defense as a disputed issue to be heard and decided at Hearing. The Industrial Commission's 8/25/08 Order only listed 1 issue to be heard and decided: Whether Claimant is entitled to the surgery recommended by R. Tyler Frizzell, M.D.? At the December 19, 2008 Hearing, the Referee listed the disputed issue to be heard and decided as follows: Whether or not the surgical procedure recommended by Mr. Watson's treating physician, Dr. Frizzell, is compensable? (Tr., p. 4, LI. 12-14).

After Claimant's counsel informed the Referee that this claim was being prosecuted as an occupational disease claim because there never was an accident, the Referee specifically asked Defense counsel if a Nelson type defense was involved in this case and counsel for Employer / Surety responded **"No. Your Honor"** (Tr., p. 4, L. 24 – p. 5, L. 1). Nevertheless, in spite of the Commission not giving Claimant proper written notice and in spite of the Defendants having ***expressly waived*** the Nelson defense on the record at the beginning of the 12/19/08 Hearing, in paragraph 11 on page 8 of its June 8, 2009 decision, the Industrial Commission held that **"Nelson and its progeny preclude recovery as there is no accident here"** (See ¶ 11 of 06/08/2009 decision).

"[A]n administrative tribunal **may not raise issues** without first serving the affected party with fair notice and providing him with a full opportunity to meet the issue." *White v. Idaho Forest Indus.*, 98 Idaho 784, 786, 572 P.2d 887, 889 (1977). Notice informing the parties of a hearing on "all issues considered by the Appeals Examiner" satisfies due process requirements. *Roll v. City of Middleton*, 105 Idaho 22, 27, 665 P.2d 721, 726 (1983)(finding compliance with due process requirements when the appeals examiner framed the issue to include the disputed topic and the parties had agreed with the issue as framed by the examiner). McGee v. J.D. Lumber Co., 135 Idaho 328, 333,

17 P.3d 272, 277 (2000).

The Industrial Commission should enter an Order On Reconsideration which removes the Nelson defense from this case because the Claimant did not have a full and fair opportunity to meet this Affirmative Defense at the December 19, 2008 Hearing and Employer / Surety expressly **waived** that defense at the December 19, 2008 Hearing (Tr., p. 4, L. 24 – p. 5, L. 1).

B. THE CLAIMANT'S BURDEN OF PROVING EACH ELEMENT IN THE PRIMA FACIE CASE FOR A COMPENSABLE OCCUPATIONAL DISEASE CLAIM DOES NOT INCLUDE ANTICIPATORY REBUTTAL OF THE NELSON DEFENSE

The Claimant has met his burden of proving each element in the prima facie case for a compensable occupational disease claim based on a preponderance of the evidence. Those elements have been defined by the Idaho Supreme Court and the Industrial Commission as follows:

As such, a claimant must demonstrate (1) that he was afflicted by a disease; (2) that the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which he was engaged; (3) that he was exposed to the hazards of such disease for a period of 60 days with the same employer; (4) that the disease was incurred in, or arose out of and in the course of his employment, and (5) that as a consequence of such disease, he become actually and totally incapacitated from performing their work in the last occupation in which he was injuriously exposed to the hazards of such disease. In addition, a claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Co., 96 Idaho 341, 528 P.2d 903 (1974). Proctor v. Anderson & Wood Construction Company, Inc., (employer) and American Casualty Company (surety) and Orius Corporation (employer) and Zurich American Insurance Company (surety), I.C. No. 01-022769 and I.C. No. 05-013965 (Filed 5/4/07).

Although there is no legal authority in the state of Idaho which requires the Claimant to anticipate and then disprove the Nelson defense as an element in the Claimant's prima facie case for a compensable occupational disease claim, the Commission denied the Claimant benefits in this case because he failed to anticipate and then disprove application of the Nelson defense in his case-in-chief. Even if the Commission given the parties proper written notice of this issue, the Defendants would still have been required to prove each element in the Nelson defense by a preponderance of the evidence.

Had the legislature intended such an allocation of the burden, it could have simply so stated. Rather, we agree with the Commission in its Order on Reconsideration that Section 72-208(1) is in the nature of an affirmative defense, which if raised by the employer, must be proved by a preponderance of the evidence by the employer. Seamans v. Maaco Auto Painting & Body Works, 128 Idaho 747, 752, 918 P.2d 1192, 1997 (1996).

Not only did the Defendants in this case fail to meet their burden of proving each element in the Nelson defense, **they expressly waived it on the record** at the inception of the 12/19/08 Hearing. Therefore, the Industrial Commission erred when it placed the burden on Claimant to disprove application of the Nelson defense in his case-in-chief. In its Order On Reconsideration, the Commission should completely remove the Nelson defense from this case.

C. **THE COMMISSION ERRED BY CONCLUDING THAT THE CLAIMANT SUFFERED FROM A PREEXISTING CONDITION IN HIS LUMBAR SPINE PRIOR TO THE TIME WHEN HIS NEW LUMBAR SPINE OCCUPATIONAL DISEASE BECAME SYMPTOMATIC IN NOVEMBER OF 2007**

This is not a case where the Claimant is seeking compensation for the aggravation of a preexisting condition. There is no evidence of a preexisting condition before the Commission. This is a case where the Claimant is seeking compensation for an original non-acute lumbar spine occupational disease caused by exposure to the hazards of repetitive heavy lifting, twisting and bending while working as a Sawyer / Assembler / Cabinet Maker for Joslin Millwork. The Nelson defense only applies in those cases where the Claimant is seeking compensation for the aggravation of a preexisting condition.

Unless a claimant seeking compensation for the **aggravation of a preexisting condition** proves that an accident as defined in I.C. § 72-102(15)(b), aggravated the preexisting condition, as Nelson has failed to do in this case, the claimant is not entitled to compensation. Nelson v. Proneness-Warren Idgas Enterprises, 126 Idaho 129, 133, 879 P.2d 592, 596 (1994).

The law in Idaho clearly states that an employee **who suffers from a pre-existing condition** must establish that his or her disease was aggravated by an accident before they are entitled to recover. Nelson v. Ponsness-Warren Idgas Enter., 126 Idaho 129, 133, 879 P.2d 592, 595 (1994). McGee v. J.D. Lumber, 135 Idaho 328, 335, 17 P.3d 272, 279 (2000).

For Nelson to apply and preclude recovery in this case as concluded by the Commission, the Defendants would have to present evidence to the Industrial Commission that the Claimant suffered from a preexisting condition in his lumbar spine that was in existence before he went to work for Joslin Millwork on September 13, 2005 or before his non-acute lumbar spine occupational disease became symptomatic in November of 2007. The Defendants did not present such evidence in this case because it does not exist. In Nelson, the Claimant's preexisting condition was the **previously manifested** occupational disease of carpal tunnel syndrome. However, the Idaho Supreme Court has not limited the application the Nelson defense to preexisting and previously manifested occupational diseases:

Although the evidence in Nelson established that the claimant suffered from a pre-existing occupational disease, **the holding in Nelson is not limited to those cases where the pre-existing condition amounts to an occupational disease.** In Nelson the court relied on several earlier cases in reaching its decision, including Carlson v. Batts, 69 Idaho 456, 207 P. 2d 1023 (1949). In Carlson the Court held that in order to receive compensation for aggravation of a "**pre-existing bodily weakness, infirmity or susceptibility**" a claimant must establish that the aggravation or injury was the result of an accident. Id. at 458, 207 P. 2d at 1025. The reliance on Carlson indicates that **the holding in Nelson extends to all pre-existing conditions, whether they are occupational diseases or simply weakness or susceptibilities.** This Court recently clarified this point in Reyes v. Kit Manufacturing Co., 131 Idaho 239, 953 P. 2d 989 (1998), when it stated:

"The essence of Nelson is that a pre-existing occupational disease ***is just like any other pre-existing condition.*** For a current employer to be liable for the aggravation of the condition, there must be an accident." Id. at 241, 953 P. 2d at 991. Demain v. Bruce McLaughlin Logging, 132 Idaho 782, 784, 979 P.2d 655, 657(1999).

The Industrial Commission did not characterize the **lingering effects of DeMain's 1976 injuries as a pre-existing "occupational disease," but rather as a pre-existing "weakness or susceptibility."** Id. at 783, 979 P.2d at 656. The Commission found that DeMain's pre-existing injury was "aggravated or 'lit up'" by the repetitive trauma he incurred operating heavy equipment for McLaughlin. Id.

In DeMain, this Court stated "the holding in Nelson is **not limited** to those cases where the pre-existing condition amounts to an occupational disease." Accordingly, DeMain's "weakness or susceptibility" arising from the 1976 work accident was found to bring Nelson into play, and without a second accident with his new employer the aggravation of DeMain's pre-existing condition was not compensable. Id. at 784-85, 979 P.2d at 657-58. **In short, DeMain expanded Nelson to apply not only to pre-existing occupational diseases, but also to the effects of pre-existing injuries.** Id. at 782-83, 979 P.2d at 655-56. Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 455, 111 P.3d 135, 140 (2005) (emphasis supplied).

Based on Nelson, DeMain, McGee and Sundquist, the Industrial Commission cannot apply the holding in Nelson to preclude recovery in this case unless the Defendants had come forward and presented evidence to the Industrial Commission which proved that the Claimant suffered from one the following preexisting conditions:

- A preexisting lumbar spine occupational disease that had already "manifested" itself before the Claimant went to work for Joslin Millwork on 09/13/2005

OR

- The lingering effects of a preexisting lumbar spine "injury" (i.e., according to DeMain and Sundquist, there must be a prior "injury" that results in a lumbar spine weakness, infirmity or susceptibility).

The Defendants did not come forward and present evidence of a preexisting lumbar spine condition at the December 19, 2008 hearing because it does not exist. That is why the Defendants ***expressly waived*** the Nelson defense on the record. In spite of that "waiver", the Industrial Commission attempted to lay the

foundation for application of the Nelson defense in paragraph 11 on pages 7 - 8 of its June 8, 2009 decision. The Commission described the Claimant's alleged preexisting conditions as ***degenerative disc disease, facet arthritis, underlying degenerative joint disease, arthritis and underlying disease.***

D. **THE COMMISSION ERRED WHEN IT CONCLUDED THAT THE CLAIMANT SUFFERED FROM A PRE-EXISTING LUMBAR SPINE OCCUPATIONAL DISEASE THAT HAD MANIFESTED ITSELF PRIOR TO HIS EMPLOYMENT WITH JOSLIN MILLWORK**

The Industrial Commission did not indicate in paragraph 11 of its decision whether it was treating the Claimant's alleged preexisting lumbar spine conditions as preexisting lumbar spine occupational diseases or as the lingering effects of a preexisting lumbar spine "injury" (i.e., a weakness, infirmity or susceptibility). If the Commission found in this case that the Claimant's alleged preexisting lumbar spine conditions constituted a preexisting occupational disease, then Nelson cannot be applied to the facts of this case ***as a matter of law*** because the Claimant's alleged preexisting lumbar spine occupational disease never "manifested itself" before the Claimant started working for Joslin Millwork, Inc. on September 13, 2005.

The Nelson doctrine does not apply to all cases where there is an occupational disease, ***only in those where the claimant's occupational disease pre-existed employment with the employer from whom benefits are sought.*** Id. Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 453, 111 P.3d 135, 138 (2005) (emphasis supplied).

...

For an ***occupational disease to be a pre-existing condition*** under the holding in Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994), ***there must have been a prior manifestation of the disease.*** Id. at 141 Idaho 454, 111 P.3d 139 (emphasis supplied).

"Manifestation" is defined by Idaho Code §72-102 (19) as follows:

"Manifestation" means the time when an **employee knows** that he has an occupational disease, or whenever a **qualified physician shall inform** the injured worker that he has an occupational disease.

There is no evidence before the Industrial Commission that proves the Claimant **knew** he suffered from a lumbar spine occupational disease **before** he went to work for Joslin Millwork on September 13, 2005. There is no evidence before the Industrial Commission which proves that the Claimant was **informed by a qualified physician** that he suffered from a lumbar spine occupational disease **before** he went to work for Joslin Millwork on September 13, 2005. Therefore, the Industrial Commission erred ***as a matter of law*** when it held that the Claimant suffered from a preexisting occupational disease and Nelson precluded recovery under the facts of this case.

E. THE COMMISSION ERRED WHEN IT CONCLUDED THAT THE CLAIMANT SUFFERED FROM THE LINGERING EFFECTS OF A PREEXISTING LUMBAR SPINE INJURY BEFORE NOVEMBER 2007

The Nelson defense only applies where there is evidence of a preexisting condition. Based on the Idaho Supreme Court's holding in Sundquist, the preexisting condition can be either an occupational disease that has "**manifested**" itself before the Claimant came to work for the present employer or the lingering effects of a "**preexisting injury**" (i.e., a weakness or susceptibility).

In short, DeMain expanded Nelson to apply not only to pre-existing occupational diseases, but also to the effects of pre-existing injuries. Id. at 782-83, 979 P.2d at 655-56. Sundquist, *supra* at 141 Idaho 455, 111 P.3d 140 (2005) (emphasis supplied).

Under DeMain and Sundquist, there must first be a preexisting injury before there can be the lingering effects of that injury. Without a preexisting injury, the lingering effects of a non-injury can never develop into a preexisting condition. For Nelson to apply to the facts of this case, the Defendants would first have to present verifiable medical evidence to the Commission that the Claimant suffered a "preexisting injury" to his low back which caused him to develop the lingering effects of that injury; i.e., **degenerative disc disease, facet arthritis, underlying degenerative joint disease, or arthritis** in his lumbar spine.

In paragraph 11 of its June 8, 2009 decision, the Commission attempts to create the impression that the Claimant suffered a preexisting injury to his low back by emphasizing that he went to a chiropractor twice in December of 2005 and complained of low back pain. However, as noted by the Commission in its decision, the Claimant's low back pain in December of 2005 came on spontaneously at home without an accident and without an injury. (i.e., "Dr. Meissner's records from December 2005 reflect that Claimant's low back pain arose without accident and was first noted on a Sunday, while at home"). According to the Court in Sundquist, the DeMain decision only expanded the scope of Nelson to include the lingering "effects of pre-existing injuries". Since the Claimant did not suffer any prior injury to his low back in December of 2005, Nelson does not apply as a matter of law and it was error for the Commission to rely on Nelson to bar recovery.

Even if the Claimant's generic complaint of low back pain in December of 2005 had been due to a specific low back injury, there is no evidence before the Industrial Commission that this alleged injury was serious enough to cause the "lingering effects" of **degenerative disc disease, facet arthritis, underlying degenerative joint disease, or arthritis** in his lumbar spine. In fact, the objective medical evidence in Dr. Meissner's medical records proves exactly the opposite; i.e., the Claimant's lumbar spine was completely

"negative for pathology" in December of 2005 (See X-Ray # 2651 referenced in Bates No. 013004).

According to Stedman's On-Line Medical Dictionary, the term **"pathology"** is defined as follows:

pathology (pa-thol-j)

The medical science, and specialty practice, concerned with all aspects of disease, but with special reference to **the essential nature, causes, and development of abnormal conditions, as well as the structural and functional changes that result from the disease processes**. [patho- + G. logos, study, treatise]

The X-Ray taken by Dr. Meissner on December 13, 2005 proves that Dr. Weiss was wrong when he opined that the Claimant suffered from preexisting degenerative disc disease and arthritis. The Claimant's 12/13/05 X-Ray did **not** show any evidence of degenerative disc or joint disease. The Claimant's 12-13-05 X-Ray did **not** show any evidence of facet arthritis. The Claimant's 12-13-05 X-ray did **not** show any evidence of general arthritis. Based on the results of the Claimant's 12-13-05 X-Ray, there is absolutely no substantial and competent medical evidence before the Commission to support a finding that the Claimant suffered the "lingering effects" of a preexisting injury.

There is no evidence before the Commission which proves that the Claimant's left buttock cramping and left lower extremity radicular symptoms in November of 2007 resulted from the aggravation of a "preexisting injury". Therefore, the Nelson defense cannot be applied to the facts of this case **as a matter of law**.

Unlike in DeMain, here **the record contains no suggestion** Sundquist's pain resulted from having aggravated a **pre-existing injury** caused by an accident. Consequently, the holding in DeMain does not apply to the present facts. Sundquist, *supra* at 141 Idaho 455, 111 P.3d 140 (2005) (emphasis supplied).

F. **THE INDUSTRIAL COMMISSION ERRED WHEN IT RETROACTIVELY APPLIED THE FINDINGS ON THE CLAIMANT'S 1/23/08 MRI AS PROOF OF THE EXISTENCE OF A PREEXISTING CONDITION INSTEAD OF PROOF THAT THE CLAIMANT HAD CONTRACTED / INCURRED AN ORIGINAL NON-ACUTE OCCUPATIONAL DISEASE AT JOSLIN MILLWORK**

The Claimant's non-acute lumbar spine occupational disease was not discovered until the results from the Claimant's 1/23/08 lumbar spine MRI scan became available. The Claimant did not have any imaging studies prior to that date which showed degenerative disc disease in his low back. Because the Commission did not have any prior imaging studies to prove that the Claimant suffered from pre-existing degenerative joint disease or arthritis in his lumbar spine, the Industrial Commission has evidently taken the 1/23/08 MRI findings and **applied those findings retroactively** to the time period before the Claimant first began complaining of left buttock and left leg radicular symptoms in November of 2007:

"Claimant's underlying degenerative joint disease and arthritis was [sic] [were] **certainly present in November of 2007** and was [sic] [were] not caused by his work" (See ¶11 on page 7 of 06/08/2009 Decision) (emphasis supplied). .

The Industrial Commission has improperly misconstrued the findings on the Claimant's 1-23-08 MRI as proof that the Claimant's lumbar spine occupational disease must have pre-existed itself. This hypothesis rests on the erroneous assumption that the Claimant's lumbar spine occupational disease came into existence at a specific moment in time in November of 2007 when the Claimant began experiencing left lower extremity symptoms. The Idaho Supreme Court has correctly found that non-acute occupational diseases do not come into existence at a specific moment in time but rather develop over time.

As an occupational disease develops over time, it is possible for the disease to be "incurred" by a claimant under a series of different employers before it becomes manifest. In such a situation, I.C. § 72-439(3) provides that it is the last such employer, or its surety, who is liable to the claimant.*fn1 Here, the Industrial Commission found Precision to be that last employer within the meaning of I.C. § 72-439(3) and therefore correctly placed liability with Precision. Sundquist, supra 141 Idaho 456, 111 P.3d 141 (2005) (emphasis supplied).

The Commission has failed to take into consideration that the Claimant's lumbar spine occupational disease had been in progress since he first became exposed to the hazards of repetitive heavy lifting, twisting and bending as a Sawyer / Assembler in mid-2006. After being exposed to those hazards continuously for approximately 18 months since mid-2006, the Claimant's lumbar spine degenerative disease had grown progressively worse until his L5-S1 disc herniated in November of 2007 and forced him to seek medical attention.

The findings on the Claimant's 01/23/08 MRI prove that that the Claimant's lumbar spine went from being "**negative for pathology**" at the time of his 12/13/05 lumbar spine X-Ray to showing signs of moderate-to-severe degenerative changes (Bates No. 009001-009002).

IMPRESSION: There is a moderate sized left paracentral disk herniation at L5-S1 with an extruded fragment which may be a free fragment extending down into the left lateral recess dorsal to the S1 vertebral body resulting in severe left lateral recess stenosis and displacement of the traversing left S1 nerve root posteriorly. There is no central canal stenosis.

There is advanced degenerative disk disease at L5-S1 with mild left neural foraminal stenosis secondary to loss of disk space height and eccentric disk bulge. There is moderate to severe left L4-5 and mild-moderate bilateral L5-S1 facet joint arthropathy. (Bates No. 009001-009002).

After 18 months of being exposed to the hazards of repetitive heavy lifting, twisting and bending activities in a small space while operating the beam saw machine at a fast production pace, the Claimant developed moderate-to-advanced degenerative changes in his lumbar spine which eventually caused his L5-S1 disc to herniate. The contrast between the Claimant's 12/13/05 X-Ray and his 1/23/08 MRI is the best evidence that the Claimant had contracted / incurred a new and original non-acute occupational disease as the result of being exposed to the hazards of the Claimant's Sawyer / Assembler / Cabinet Maker job.

The record before the Commission does not contain any imaging studies which prove these degenerative findings were present before the Claimant went to work for Joslin or before his disease became symptomatic in November of 2007. Therefore, the Commission was forced to give retroactive application to the Claimant's MRI findings in order to find evidence of a pre-existing condition so that the Nelson doctrine could be applied to preclude recovery. This retroactive application of the Claimant's MRI results was improper. As indicated by the Supreme Court in the following cases, the Nelson doctrine can only be applied in those cases where there is undisputed medical evidence which verifies the existence of the pre-existing condition before the Claimant goes to work for the Defendant employer or before the Claimant's condition becomes symptomatic.

1. Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994) (Claimant had a medical diagnosis of CTS and a surgical recommendation in 1980 – 8 years before she went to work for Defendant employer. Claimant declined surgery. Claimant filed current claim in 1988 for the aggravation of a pre-existing condition and underwent bilateral CTS release surgery in 1989. Held: No recovery because no evidence that a new accident aggravated the **medically documented and verified** pre-existing condition of CTS);
2. Langley v. Industrial Special Idem. Fund, 126 Idaho 781, 890 P.2d 732 (1995) (Claimant was involved in an industrial accident in May of 1987 that caused injury to his right knee. Claimant received a medical diagnosis of torn meniscus and a surgical recommendation in December of 1987. Claimant declined surgery in 1987. Claimant's knee symptoms then grew worse. Claimant filed current aggravation claim in 1990. Claimant had surgery in 1990. Held: Nelson barred recovery as no accident aggravated the **medically documented and verified** pre-existing right knee injury);
3. Reyes v. Kit Mfg. Co., 131 Idaho 239, 953 P.2d 989 (1998) (Claimant's bilateral CTS became symptomatic in 1980. Claimant was diagnosed with bilateral CTS in 1987. Claimant had left CTS release surgery in 1989. Claimant went to work for current employer in 1994 and began complaining to his doctor about CTS symptoms within a month. Held: Nelson barred recovery as no accident aggravated the **medically documented and verified** pre-existing condition);
4. DeMain v. Bruce McLaughlin Logging, 132 Idaho 782, 979 P.2d. 655 (1999) (Claimant suffered an on-the-job injury to his back in 1976 and missed 3 weeks of work. Claimant went to work for current employer in 1985. Claimant quit on June 26, 1991. One month later, on July 19, 1991, Claimant filed an occupational disease claim based on repetitive trauma to his spine from operating the skidder. Held: Nelson barred recovery because no new accident aggravated the **medically documented and verified** pre-existing condition of herniated disc and degenerative disc disease).

5. Cutsinger v. Spears Manufacturing Company, Inc., 137 Idaho 464, 50 P.3d 479 (2002) (Claimant injured his left elbow in a football injury in 8th grade. Claimant had several surgeries on his left upper extremity between 1980 and 1990. In 1994, Claimant went to work for current employer. While working for employer, Claimant's left arm and wrist began to bother him. In 1999, Claimant filed a worker's compensation claim seeking benefits for his left wrist. Held: Nelson barred recovery because no new accident aggravated the **medically documented and verified** pre-existing left arm / wrist condition).

6. Koch v. Micron Technology, 136 Idaho 885, 42 P.3d 678 (2002) (When Claimant went to work for Micron in October of 1997, she already suffered from pre-existing calcific tendonitis in her right shoulder. The repetitive nature of her work aggravated this condition. In February of 1999, she began receiving medical treatment and surgery was performed in July of 1999. Held: Nelson barred recovery because no new accident aggravated the undisputed and **medically documented and verified** pre-existing right shoulder condition).

7. Konvalinka v. Bonneville County, 140 Idaho 477, 95 P.3d 628 (2004) (All parties agreed that Claimant suffered from pre-existing bilateral osteoarthritis at the base of her thumbs and that her court reporter employment aggravated that condition, making it symptomatic, but did not cause it. Held: Nelson barred recovery because no new accident aggravated the **undisputed and medically verified** pre-existing condition).

The Claimant's pre-existing condition in all of the above cases had been **medically documented and verified before** the Claimant went to work for the Defendant employer or **before** the Claimant's asymptomatic pre-existing condition became symptomatic. There is no medical evidence before the Commission in this case that the Claimant had been diagnosed with or suffered from the pre-existing conditions of **"underlying degenerative joint disease and arthritis"** before he went to work for Joslin in September of 2005 or before his lumbar spine occupational disease became symptomatic in November of 2007. Therefore, as a matter of law, Nelson cannot be applied to bar recovery in this case.

The findings on the Claimant's 1/23/08 MRI merely confirm that the Claimant had contracted / incurred his lumbar spine occupational disease as the result of exposure to hazards in his job at Joslin Millwork between mid-2006 and 1/23/08. On Reconsideration, the Commission should amend paragraph 11 and find that the Claimant did not have a pre-existing lumbar spine disease, but rather contracted / incurred a new and original non-acute lumbar spine occupational disease that was caused by his employment with Joslin.

(3) **THE COMMISSION ERRED BY CONCLUDING THAT THE HAZARDS OF CLAIMANT'S LUMBAR SPINE OCCUPATIONAL DISEASE WERE NOT CHARACTERISTIC OF AND PECULIAR TO HIS JOB AS A SAWYER / ASSEMBLER / CABINET MAKER**

The Commission concluded in ¶¶ 13 – 14 of its June 8, 2009 decision that the hazards of the Claimant's lumbar spine occupational disease were **not** **"characteristic of and peculiar to"** his job as a Sawyer / Assembler / Cabinet Maker for Joslin Millwork.

"To be sure, Claimant's job involved a good deal of heavy lifting, twisting, bending, etc. However, so do many, if not most jobs which involve manual labor. Here, **no particular machine**, or **constant repetitive activity is implicated** in causing Claimant's disease... This case is more like *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759

(1996), and accordingly, the Referee finds that claimant has failed to establish that his disease is the result of his exposure to a risk of injury [sic] [hazard] which is characteristic of and peculiar to his employment at Joslin" (See ¶14 of 06/08/2009 decision) (emphasis supplied).

The test of whether a hazard is characteristic of and peculiar to the Claimant's trade or occupation has been defined by the Idaho Supreme Court as follows:

This Court has previously discussed how the statutory phrase "characteristic of, and peculiar to" is to be construed. In *Bowman v. Twin Falls Const. Co., Inc.*, 99 Idaho 312, 581 P.2d 770 (1978), we adopted the construction given by the Supreme Court of Michigan in holding that:

The phrase, "peculiar to the occupation," is not here used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations. 99 Idaho at 323, 581 P.2d at 781, overruled on other grounds, *DeMain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 655 (1999) (emphasis in original). *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 55, 14 P.3d 372, 375 (2000).

A. THIS CASE IS CLEARLY DISTINGUISHABLE FROM OGDEN V. THOMPSON BECAUSE THE CLAIMANT IN THIS CASE PRESENTED UNREFUTED AND DETAILED EVIDENCE ABOUT THE PARTICULAR ACTIVITIES OF HIS JOB THAT EXPOSED HIM TO THE HAZARDS OF LUMBAR SPINE DISK DISEASE THAT WOULD NOT BE ENCOUNTERED IN THE GENERAL RUN OF OCCUPATIONS

Although employer / surety did not cite *Ogden v. Thompson* 128 Idaho 87, 910, P.2d 759 (1996) in their May 1, 2009 Responsive Brief, the Commission relied on the holding from *Ogden* to support its conclusion that the hazards of the Claimant's job were indistinguishable from the general run of manual labor occupations. The facts before the Industrial Commission in this case are clearly distinguishable from *Ogden*.

The Claimant in *Ogden* lost because he "failed to present sufficient evidence regarding the particular hazards of his job" as a shop manager to justify a finding that he contracted an occupational disease". *Id.* at 128 Idaho 90, 910 P. 2d 762 (1996) (emphasis supplied). Whereas, the Claimant in this case presented detailed and unrefuted evidence about the particular hazards of his job in the form of a detailed Job Description (Exhibit No. 3) and detailed sworn testimony at Hearing (Tr., p. 22, L. 13 – p. 36, L. 5).

The unrefuted evidence in this case proves that the Claimant was required to stand in a confined 5 X 7 foot space between his forklift, a unit (pallet) of stacked 4 X 8 sheets of particle board and a piece of machinery described as the "beam saw". In order to physically move each 4 X 8 sheet of 150 pound particle board off of the forklift / unit stack and place it onto the bed of the beam saw, the Claimant would have to reach

out away from his body and manually grab each 150 pound sheet with his hands. He would then lift each 150 pound sheet of 4 X 8 particle board and twist / turn his body around approximately 180 degrees in order to manually position each sheet onto the bed of the beam saw (Exhibit No. 3) (Tr., P. 22, L. 13 – P. 36, L. 5).

The Claimant gave unrefuted testimony at the December 19, 2008 Hearing that he was required to perform this combined lifting, twisting and turning movement (i.e., torquing maneuver) approximately 30 to 50 times during each 8 hour shift (Tr., P. 26, L. 23 – P. 27, L. 4). Since the Claimant was required to repetitively lift, twist / turn and position between 30 – 50 of these 4 X 8 sheets onto the bed of the beam saw each day and each sheet weighed 150 pounds, that means that the Claimant was manually lifting and **torquing** with his spine between 4,500 pounds to 7,500 pounds of product each 8.0 hour work shift; (i.e., 30 pieces X 150 pounds = 4,500 pounds. 50 pieces X 150 pounds = 7,500 pounds).

The Claimant performed all of these heavy repetitive lifting / torquing maneuvers at the moderate to fast pace of the production cycle. The Claimant's unrefuted job description proved that during a standard 8.0 hour work shift, the Claimant was required to lift, carry, twist, turn, bend at the waist, push and pull these laminate sheets approximately 6 out of every 8 hours or 75% to 80% of the time (Exhibit No. 3) (Tr., P. 27, Ll. 5 – 15).

Even the Defendants' IME expert Dr. Weiss admitted that when you combine a lifting movement with a twisting / turning movement, that torquing movement would significantly increase the pressure on the worker's intervertebral discs. There was absolutely no evidence in Ogden that the Claimant was required to perform a combined lift / twist (torquing) maneuver while lifting a laminate particle board 4 X 8 feet in dimension that weighed 150 pounds while standing in a static position in a confined space between 3 pieces of equipment at a fast production cycle pace.

There was no factual basis for the Industrial Commission to rely on Ogden and conclude in this case that the hazards of the Claimant's job were indistinguishable from the general run of manual labor occupations. For that conclusion to have merit, the Commission would first have to find that the **"general run"** of manual labor occupations expose all manual laborers to all of the following hazards that were characteristic of and peculiar to the Claimant's job at Joslin Millwork:

- The general run of manual labor occupations would have to require the worker to stand in a relatively static position in a confined 5 X 7 foot space between the beam saw machine, a forklift, and a unit stack of 4 X 8 sheets of particle board.

- The general run of manual labor occupations would have to require the worker to reach out away from his body and manually grab and lift between 30 and 50 sheets of particle board 4 X 8 in dimension with a total weight between 4,500 and 7,500 pounds off of a unit stack during 6.0 hours out of every 8.0 hour work shift (i.e., 75% to 80% of the time).
- The general run of manual labor occupations would have to require the worker to lift 150 pounds of raw materials and then repetitively twist / turn 180 degrees at the waist in order to place each sheet of particle board on the bed of the beam saw machine that the worker was operating.
- The general run of manual labor occupations would have to require the worker to perform all of these repetitive heavy lifting, twisting and turning activities at the moderate-to-fast pace of the production cycle.
- The general run of manual labor occupations would have to require the worker to perform all of these repetitive heavy lifting, twisting and turning activities repetitively for 6.0 hours out of every 8.0 hour work shift.

The Commission failed to consider the detailed and unrefuted evidence of the *particularized duties* of the Claimant's job which clearly exposed him to the hazards of lumbar spine degenerative disc disease. Instead, the Commission glossed over the biomechanics of the Claimant's job duties and generically lumped all of his physical movements together into the broad categories "heavy lifting, twisting, bending, etc." (See ¶14).

While it may be true that some if not many manual labor jobs may require some generalized heavy lifting, twisting / turning, and bending movements, it is extremely unlikely that the general run of all manual labor occupations would require that all of these activities be performed at a moderate-to-fast production cycle pace while standing in a static position in a very confined 5 X 7 foot space between a beam saw machine, a forklift and a unit stack while reaching out and grabbing 4 X 8 particle boards that weigh 150 pounds each and then twisting / turning around 180 degrees to place the raw materials onto the bed of a beam saw machine.

Approximately four years after Ogden was decided in 1996, the Idaho Supreme Court held in Mulder that the Claimant had met his burden of proving the characteristic of and peculiar to element of his claim because most jobs did not require the worker to perform all of the activities that the Claimant was required to perform in his senior loss prevention consultant job for Liberty Northwest Insurance Company:

Moreover, the vast number of occupations which may require one or more of these activities likely do not require all of them. Mulder, *supra* at 135 Idaho 55, 14 P.3d 375 (2000).

Employer / surety argued in Mulder that the Claimant had failed to prove that his carpal tunnel syndrome was characteristic of and peculiar to his job because "such claims *involve exposure to hazards which are common to the activities of day to day living*, and are *indistinguishable from the vast majority of other occupations*". Mulder, *supra* at 135 Idaho 55, 14 P.3d 375 (2000) (emphasis supplied). The Supreme Court rejected that argument by noting that:

While it is noted that *a great number of occupations require an employee to drive, write or use a computer keyboard, an equally great number do not.* Mulder, *supra* at 135 Idaho 55, 14 P.3d 375 (2000).

The same logic used by the Court in Mulder to find that the Claimant's job duties were distinguishable from the general run of occupations applies equally to the facts of this case. While it may be true that "a great number" of manual labor jobs require the generic activities of repetitive heavy lifting, twisting and bending, it is likewise just as true that "an equally great number" of manual labor jobs do not require the worker to be exposed to the *particular hazards* of the Claimant's job in this case; i.e., the worker is not required to stand in a confined 5 X 7 foot space between a beam saw machine, a forklift and a unit stack and manually lift between 30 - 50 particle boards that are 4 X 8 in dimension and weigh 150 pounds each and then twist / turn 180 degrees at the waist in order to place each 4 X 8 sheet onto the bed of the beam saw machine at a moderate-to-fast production cycle pace for 75% to 80% of each 8.0 hour work shift. The Claimant's risk of exposure to these particular hazards is clearly distinguishable from the general run of manual labor occupations.

The unrefuted job description information relied on by the Claimant in this case to prove exposure to the particular hazards of his job is exactly the same type of information that the Commission and the Supreme Court relied on in Mulder to find that the hazards of the Claimant's carpal tunnel syndrome were characteristic of and peculiar to his job:

The Commission based its factual determination, in part, on the medical testimony of Dr. Lenzi and upon the description of the job duties peculiar to Mulder's position with Liberty. Mulder, *supra* at 135 Idaho 55, 14 P.3d 376 (2000) (emphasis supplied).

The Claimant in this case was also required to lift and carry the fabricated pieces of cut product from the beam saw over to the production cart and then *bend over at the waist* and place the pieces of fabricated product onto the shelves of the production cart. Even the Defendants IME expert Dr. Weiss admitted that *lifting*

while bending at the waist is an activity or body posture that places significant increased pressure on the intervertebral discs in the low back ³. While performing these combined lifting / bending movements, the Claimant would stretch out his right leg and place his right foot behind the wheel of the parts cart and use it as a brake to prevent it from rolling away while he loaded it with product (Exhibit No. 3). These awkward movements not only played a causal role in the development of the Claimant's lumbar spine occupational disease, they were characteristic of and peculiar to his particular job and distinguished it from the general run of manual labor occupations.

The Industrial Commission found that the hazard of bucking a tub with her leg distinguished the Claimant's job from the general run of occupations in the compensable lumbar spine occupational disease claim of Mattle v. Conagra Foods, 2001 IIC 0689 (Filed: 09/14/01).

Second, **bucking the tub with her leg** resulted in a **hazard which distinguished this particular employment from the general run of occupations**. *Id.* at p. 10 (emphasis supplied).

On Reconsideration in this case, the Commission should conclude that the Claimant met his burden of proving that the hazards of his disease were characteristic of and peculiar to his unique job at Joslin Millwork because he was obviously exposed to peculiar hazards that would not be encountered in the general run of manual labor occupations.

B. THE COMMISSION ERRED WHEN IT CONCLUDED THAT THE CLAIMANT DID NOT WORK WITH A PARTICULAR MACHINE THAT EXPOSED HIM TO THE HAZARDS OF HIS LUMBAR SPINE OCCUPATIONAL DISEASE

In paragraph 14 of its June 8, 2009 decision, the Industrial Commission concluded that the Claimant's job did not ***"constitute a risk of injury [sic] [exposure] that is distinguishable from the general run of occupations"*** because ***"no particular machine ... is implicated*** in causing the Claimant's disease" (See ¶14) (emphasis supplied). This finding is directly contradicted by the evidence before the Commission. The unrefuted and overwhelming evidence in this case establishes that the Claimant worked as a Sawyer which required him to operate a **specialized piece of machinery** on the production floor known as **the beam saw** for 75% to 80% of every 8.0 hour work shift ⁴.

³ See discussion at section (II) (1) (A) (8) (a) – (g), *supra*.

⁴ See discussion at section (II) (3) (A), *supra*.

C. THE COMMISSION ERRED WHEN IT CONCLUDED THAT CLAIMANT DID NOT PERFORM CONSTANT REPETITIVE ACTIVITY THAT WAS IMPLICATED IN CAUSING HIS DISEASE

In paragraph 14 of its June 8, 2009 decision, the Commission attempted to distinguish the facts in this case from the facts in Flores by stating that "[h]ere, ... no **constant repetitive activity** is implicated in causing Claimant's disease" (See ¶14). Although the Commission did not specifically cite the language from Flores that it was relying on to make this distinction, it would appear that the Commission was relying on the following quote:

As demonstrated in the video of the various jobs, the work on the slitter required **continuous bending, lifting, and twisting**. It is the **constant repetition of these three activities for long periods of time that set Claimant's work apart** from the "general run" of labor jobs, and **distinguish it** from the cases cited by Defendants in their brief. The claimants in *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996), *Zebbras v. American Linen*, 200 I.L.C. 0009, and *Lewis v. Campbell's Quality Exteriors*, 2006 I.L.C. 0739, all had jobs that required heavy physical labor, but **none of them shared the repetitive nature of Claimant's work**. Manual labor jobs are often physically strenuous. If physical exertion alone were the touchstone, it is tautological that all labor jobs would be among the "general run of occupations." It is not Claimant's level of exertion that distinguishes his work from the general run of labor jobs, it is the **constant repetition**. Flores, *supra*, at ¶¶ 47-49 (emphasis supplied).

The unrefuted evidence in this case which describes the particular duties of the Claimant's job satisfies the Flores "**constant repetitive activity**" standard and clearly sets the Claimant's work apart from the general run of occupations:

As part of the production cycle, I am required to perform these physical movements repeatedly at a very fast pace (i.e., as fast as the saw will cut the product and as fast as I can move my body while lifting and carrying these heavy sheets of laminate) (Exhibit No. 3) (Bates No. 003001).

Performing the physical movements of lifting, twisting / turning and bending "**repeatedly at a very fast pace**" is the functional equivalent of the Claimant testifying that he was engaged in "**constant repetitive activity**". According to Merriam-Webster's On-Line Dictionary, the adverb "**repeatedly**" means "again and again". The word "**constant**" means continually occurring or recurring; regular. The terms are essentially synonymous. The Claimant in this case (and every other case) should not lose an otherwise compensable claim based on arcane word play or semantics.

Therefore, this Court will construe liberally the workers' compensation law in favor of the claimant. The humane purposes, which the law serves, **leave no room for a narrow, technical construction**. See *Vincent v. Dynastic Min. Corp.*, 132 Idaho 200, 969 P.2d 249 (1998); *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996). Mulder v. Liberty Northwest Ins. Co., 135 Idaho 52, 57, 14 P.3d 372, 377 (2000) (emphasis supplied).

The Claimant should not be required to spend thousands of dollars in order to hire a vocational expert to come to Hearing and burden the record with expert testimony which explains that the words "***constant***" from Flores and "***repeatedly***" from this case mean basically the same thing.

The allocation of the burden to claimants, furthermore, might work mischief in the field of workers' compensation litigation, as it might lead to a burdening of the record with ... costly testimony from expert [witnesses]. Seamans v. Maaco Auto Painting, 128 Idaho 747, 752, 918 P. 2d 1192, 1197 (1996) (emphasis supplied).

The Claimant should not be required to assume this unnecessary financial burden because proceedings before the Industrial Commission should not be hyper-technical and over-burdened with expert opinion. The system was intended by the legislature to be summary, economical and simple:

When the Legislature created the Commission, it intended that proceedings before it be as "summary, economical, and simple" as the rules of equity would allow." Stolle v. Bennett, 144 Idaho 44, 50, 156 P.3d 545, 551 (2007) (emphasis supplied).

(III) CONCLUSION

Idaho was one of the first states to recognize the occupational disease theory of compensation for disabled workers. Since 1939, workers afflicted with diseases have been able to recover compensation for their diseases that were contracted / incurred on the job. The overwhelming evidence in this case proves that the Claimant contracted / incurred his lumbar spine occupational disease between 12/13/05 and 1/23/08 as the direct result of his exposure to the particular hazards of repetitive heavy lifting, twisting and bending activities while operating the beam saw machine at Joslin Millwork. If there is any doubt over whether the Claimant's occupational disease was contracted / incurred in his job, that doubt should always be resolved in favor of compensation for the disabled worker.

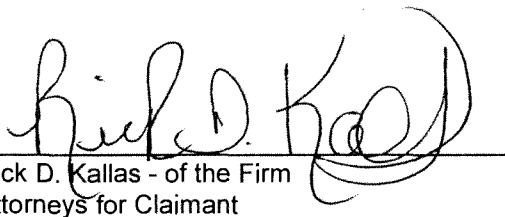
'We must liberally construe the provisions of the workers' compensation law in favor of the employee, in order to serve the humane purpose for which the law was promulgated.' " Murray-Donahue v. Nat'l Car Rental Licensee Ass'n, 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995) (citing Davaz v. Priest River Glass Co., Inc., 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994)). Page v. McCain Foods, Inc., 141 Idaho 342, 345, 109 P.3d 1084, 1087 (2005).

If there is doubt surrounding whether the accident in question [or occupational disease] arose out of and in the course of employment, the matter will be resolved in favor of the employee. Id. at 141 Idaho 347, 109 P.3d 1089 (2005) (emphasis supplied).

On Reconsideration, the Commission should liberally construe the worker's compensation act and conclude that the Claimant has met his burden of proving a compensable occupational disease claim based on the overwhelming weight of the evidence before the Commission in this case.

Respectfully submitted this 26th day of June, 2009.

Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.

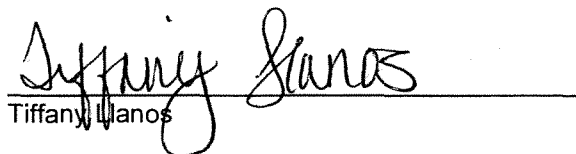
By 
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Certificate of Service

I HEREBY CERTIFY that on the 26th day of June, 2009, I served Claimant's Brief In Support of Motion For Correction of Erratum and Motion For Reconsideration by the method indicated below and addressed to the following:

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**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

ROBERT A. WATSON,

Claimant,

vs.

JOSLIN MILLWORK, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORP.,

Surety,

Defendants.

I.C. No. 2008-017579

**RESPONSE TO
CLAIMANT'S MOTION
FOR CORRECTION OF
ERRATUM AND MOTION
FOR RECONSIDERATION
OR THE JUNE 8, 2009
DECISION**

COME NOW, Defendants, Joslin Millwork, Inc., and Liberty Northwest Insurance Corp., by and through their Attorney of Record and, pursuant to JRP Rule 3 F, hereby respond to Claimant's June 26, 2009 Motion for Correction of Erratum, etc. in the above captioned case.

Consuming 49 pages of 10-pitch font, Claimant vociferously urges the Commission, in effect, to wad up its Decision of June 8, 2009, throw it away and start over. Claimant asserts that the Commission erred in three particulars: in finding that the condition for which Claimant seeks surgical treatment did not arise out of and in the course of his employment; in relying upon (if, indeed, it did) *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994) to support its decision; and, in taking guidance from the Idaho Supreme Court's decision in *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).


A clear reading of the Commission's June 8, 2009 Decision demonstrates that Claimant's arguments miss the mark: though *Ogden* and, to a far lesser degree, *Nelson* and its progeny provide context for the Commission's decision, it is the Commission's relative weighing of the opinions of Dr. Weiss and Dr. Frizzell upon which the case turns. Simply stated, though (understandably) Claimant is quite convinced by his own expert, the Commission found that the opinions stated by Dr. Weiss were better reasoned, were more fleshed out, and were more persuasive than the conclusory opinions, unsupported by any evidence of his reasoning, set forth by Dr. Frizzell. Claimant simply failed to carry his burden of persuasion.

Claimant may now well wish that he had undertaken the deposition of Dr. Frizzell in this matter, but the fact remains that he did not; he speculates upon Dr. Frizzell's rationale and asks the Commission to join him in that speculation. He provides no new evidence which the Commission did not have before it, and carefully weighed, in reaching its original decision. Consequently, Claimant's Motion for Correction of Erratum, etc., must be viewed as nothing more than a request for a second bite at the

apple; Claimant, without more, is requesting that the Commission again consider evidence already considered in the initial decision and come to a different factual finding as to whether the need for the surgery Claimant now seeks is the result of an occupational disease arising out of and in the course of Claimant's employment. The Commission has consistently rejected such invitations and ought here do the same.

DATED this 6th day of July, 2009.

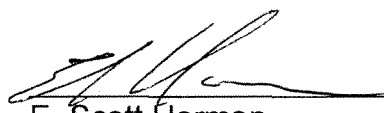
LAW OFFICES OF HARMON, WHITTIER & DAY

By: 
E. Scott Harmon
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day July, 2009, a true and correct copy of the foregoing document was served upon the following by first class mail, postage prepaid at the address indicated:

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Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.
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JUL - 6 - P 3:40
RECEIVED
INDUSTRIAL COMMISSION

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

| | | |
|-----------------------------|---|-----------------------------------|
| ROBERT A. WATSON, |) | |
| |) | |
| Claimant, |) | I.C. No. 2008-017579 |
| |) | |
| vs. |) | CLAIMANT'S REPLY TO DEFENDANTS' |
| |) | RESPONSE TO CLAIMANT'S MOTION FOR |
| JOSLIN MILLWORK, INC., |) | CORRECTION OF ERRATUM AND |
| |) | CLAIMANT'S MOTION FOR |
| Employer, |) | RECONSIDERATION OF JUNE 8, 2009 |
| |) | DECISION |
| and |) | |
| |) | AND |
| LIBERTY NORTHWEST INSURANCE |) | |
| CORPORATION, |) | CLAIMANT'S MOTION TO STRIKE |
| |) | UNDISCLOSED MEDICAL OPINIONS |
| Surety, |) | |
| Defendants. |) | |
| |) | |
| |) | |
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COMES NOW, Claimant, Robert A. Watson, by and through his attorney, Rick D. Kallas, of Ellsworth Kallas, Talboy and DeFranco, PLLC, and pursuant to I.C. §72-718, J.R.P. 3 (E) and (F) and J.R.P. 10 (E) (4) hereby submits this Reply to Defendants' Response To Claimant's Motion For Correction of Erratum and Motion For Reconsideration of June 8, 2009 Decision and Claimant's Motion To Strike Undisclosed Medical Opinions From the Record.

(I) **CLAIMANT'S REPLY TO DEFENDANTS' RESPONSE TO MOTION FOR RECONSIDERATION**

(A) **INTRODUCTION**

The Defendants' skeletal Response to the Claimant's Motion For Reconsideration consumes a scant 1.25 pages and is completely devoid of any meaningful legal analysis. In lieu of meaningful legal analysis, the Defendants have merely submitted the following clichés:

- "Claimant vociferously urges the Commission, in effect, to wad up its Decision of June 8, 2009, throw it away and start over";
- The Claimant "provides no new evidence which the Commission did not have before it"; and
- "Claimant's Motion For Correction of Erratum, etc., must be viewed as nothing more than a request for a second bite at the apple". (Def. Resp., p. 2).

The Defendants conclude their Response by implying that the Commission has an unwritten policy of consistently rejecting Motions For Reconsideration and should blindly adhere to that policy in this case. The Defendants were evidently so confident that the Industrial Commission would summarily reject the Claimant's Motion that they did not even attempt to address the substantive issues raised by the Claimant in his Motion For Reconsideration. By failing to address the legal issues with any meaningful legal analysis, the Defendants have left the Claimant's arguments unchallenged. Based on this unchallenged record, the Commission should enter the Orders of Erratum and Orders of Reconsideration requested by the Claimant.

(B) **ARGUMENT**

(1) **THE CLAIMANT MET HIS BURDEN OF PROOF WITHOUT TAKING THE TOTALLY UNNECESSARY POST-HEARING DEPOSITION OF DR. FRIZZELL**

The Defendants have attempted to over-simplify the issues raised by the Claimant's Motion For Reconsideration by arguing that the Industrial Commission's June 8, 2009 decision was based on nothing but the Commission's weighing of the medical opinions between the Claimant's attending neurological surgeon, R. Tyler

Frizzell, M.D., and the Defendants' Independent Medical Examiner (IME) Michael S. Weiss, M.D.¹. The Defendants chide the Claimant because in retrospect he "may now well wish that he had undertaken the deposition of Dr. Frizzell in this matter, but the fact remains that he did not" (Def. Resp., p. 2). The Defendants suggest that the Claimant deserves to lose this case because he failed to take Dr. Frizzell's post-hearing deposition.

The Industrial Commission must examine the Claimant's decision to **not take** Dr. Frizzell's post-hearing deposition based on the medical evidence which existed at the time the decision was made. J.R.P. 10 (E)(1) required the Claimant to file and serve written notice of his intent to take Dr. Frizzell's deposition at least 10 days prior to the December 19, 2008 hearing; i.e., on or before December 9, 2008. On December 9, 2008, the only medical evidence which addressed the elements in the prima facie case for a compensable occupational disease claim came from the Claimant's treating physicians, Neurological Surgeon, R. Tyler Frizzell, M.D. and Physiatrist, James H. Bates, M.D. Based on those medical opinions, the Claimant had clearly met his burden of proving his prima facie case (See Bates No. 008010 – 008038; Bates No. 008039-008040; Bates No. 008041 – 008042; and Bates No. 007016).

This Court has held that ***no special verbal formula is necessary*** when a doctor's testimony plainly and unequivocally conveys his conviction that events are causally related. *Jensen*, 135 Idaho at 412-13, 18 P.3d at 217-18 (citing *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979), overruled on other grounds by *Jones v. Emmett Manor*, 134 Idaho 160, 165, 997 P.2d 621, 625 (2000) (holding that "To the extent *Dean v. Dravo Corp.*, 95 Idaho 558, 511 P.2d 1334 (1973) and *Paulson* . . . ***suggest a requirement of oral medical testimony in every case, the suggestion is disavowed.***"). Rather even if a doctor expressly refuses to say the words "reasonable degree of medical probability," it can still be clear from his or her testimony that he or she considers that a claimant's injury more likely than not was caused by a work related accident. *Jensen*, 135 Idaho at 412, 18 P.3d at 217. *Stevens- McAtee v. Potlatch Corp.*, 145 Idaho 325, 334, 179 P.3d 288, 297 (2008) (emphasis supplied).

The Defendants hired Physiatrist, Michael S. Weiss, M.D. to be their Independent Medical Examination (IME) expert in this case. On December 9, 2008 when the Claimant made the decision to not depose Dr. Frizzell, the only medical opinions issued by Dr. Weiss were set forth in his 10/1/08 IME report. The following medical opinions were taken verbatim from the **DISCUSSION** section of Dr. Weiss's October 1, 2008 IME report.

DISCUSSION: Robert A. Watson had onset of low back and left leg pain in 11/07 without specific injury. He has MRI evidence of multilevel disk degeneration and facet arthritis and a free

¹ The Defendants' listing of the issues is incomplete. The June 8, 2009 Decision was based on multiple grounds all of which were addressed in the Claimant's June 26, 2009 Motion and Brief.

fragment but minimal localizing findings on exam except as noted above. Given the chronic nature of his pain and the lack of response to conservative treatment, it is within the standard of community practice for him to undergo the surgery recommended by Dr. Frizzell.

He does have a past history of two motor vehicle accidents, one sufficient to cause permanent hearing loss in the left ear and another sufficient to cause him to seek care in the ER and be taken off work. Why Dr. Frizzell believes these are unrelated to his spinal diagnoses on a more likely than not basis, but his 2 years of work as a cabinet maker is causal is not clear. Back pain and spinal arthritis are common in the general population.

Heavy work is also called exercise and is generally thought to be beneficial. In fact, individuals who do strictly sedentary work also have high rates of back pain complaint and disability. Dr. Frizzell's logic would seem to imply that all heavy activity is hazardous and would seem to preclude not only the 15% of jobs that are heavier than moderate but most contact sports and much exercise regimens at gymnasias.

I hope this answers your questions regarding Robert A. Watson. If you have further questions, please feel free to contact me. (Bates No. 014009)

Dr. Weiss only expressed four (4) opinions in the **DISCUSSION** section of his 10/1/08 IME report – none of which discussed the specific hazards of the Claimant's job or addressed any of the elements in the prima facie case for a compensable occupational disease claim. Dr. Weiss's medical opinions are set forth below:

1. It would be within the standard of care for the Claimant to have the surgery recommended by Dr. Frizzell;
2. Back pain and spinal arthritis are common in the general population;
3. Heavy work is exercise and exercise is generally thought to be beneficial; and,
4. Sedentary workers have high rates of back pain complaint and disability.

After receiving Dr. Weiss's 10/1/08 IME report, the Claimant forwarded Dr. Weiss's 10/1/08 IME report to his attending physicians, Psychiatrist James Bates, M.D. and Neurological Surgeon, R. Tyler Frizzell, M.D. and asked both doctors if the medical opinions in Dr. Weiss's 10/1/08 IME report changed their analysis of the Claimant's occupational disease claim. Both of the Claimant's attending physicians clearly indicated that Dr. Weiss's IME medical opinions did **not** change their occupational disease analysis (See Bates No. 008041 – 008042 and Bates No. 007016).

Based on the evidence in the record at the time when the Claimant made the decision that Dr. Frizzell's post-hearing deposition was totally unnecessary, there was no reason for the Claimant to waste \$3,300.00 taking Dr. Frizzell's post-hearing deposition because Dr. Weiss's 10/1/08 IME report did not contain any medical opinions which rebutted the Claimant's prima facie case and both Dr. Frizzell and Dr. Bates had already commented on Dr. Weiss's 10/1/08 IME report.

Considering the **financial and time burdens of depositions**, however, **it is not reasonable to expect parties to depose every expert witness** listed. Clark v. Klein, 137 Idaho 154, 158, 45 P.3d 810, 814, f.n. 1 (2002) (emphasis supplied).

(2) ON RECONSIDERATION THE INDUSTRIAL COMMISSION SHOULD EXCLUDE FROM THE RECORD ALL POST-HEARING MEDICAL OPINIONS EXPRESSED BY THE DEFENDANTS' IME MEDICAL EXPERT MICHAEL S. WEISS, M.D. TO THE EXTENT THOSE MEDICAL OPINIONS DEVIATED FROM THE 4 MEDICAL OPINIONS EXPRESSED IN DR. WEISS'S 10/01/2008 IME REPORT

The Defendants had a duty to make full disclosure of the substance and subject matter of Dr. Weiss's medical opinions prior to the December 19, 2008 Hearing (see I.R.C.P. 26 (b) (4) and J.R.P. (E) (4)). The only disclosure made by the Defendants prior to the December 19, 2008 hearing came in the form of Dr. Weiss's October 1, 2008 IME report. The Defendants were not allowed to modify, expand or alter the opinions in Dr. Weiss's 10/1/08 IME report because to do so would be **developing or manufacturing** new medical evidence post-hearing that the Claimant would never have the opportunity to rebut.

When the Claimant made the decision to not take Dr Frizzell's post-hearing deposition, the Claimant based his decision on the premise that J.R.P. 10 (E) (4) prevented the Defendants from **manufacturing or developing** new medical evidence after the December 19, 2008 Hearing which had not been properly disclosed in Dr. Weiss's 10/1/08 IME report:

Defendants cite JRP 10(E)(4) and object to the consideration of evidence of Dr. Howar's September 18, 2006, examination and causation opinion based thereon, all of which was developed post-hearing. Claimant notes that Defendants did not object at the time of Dr. Howar's deposition. Indeed, Defendants' counsel inquired about causation and posed the very question which elicited Dr. Howar's causation opinion based on his post-hearing examination of Claimant.

Nevertheless, JRP 10(E) contains no language limiting its operation to circumstances where an objection is expressed. JRP 10(E)(4) specifically forbids precisely what Claimant attempts herein. It states in relevant part:

Unless the Commission, for good cause shown, shall otherwise order at or before the hearing, the evidence presented by post-hearing deposition shall be evidence known by or available to the party at the time of the hearing and shall not include evidence developed, manufactured, or discovered following the hearing. Experts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing but not on evidence developed following hearing except on a showing of good cause and order of the Commission. JRP 10(E)(4).

In the present case no order was requested by any party, nor entered by the Commission, to allow the consideration of evidence developed post-hearing. Dr. Howar's post-hearing deposition testimony and opinions concerning his post-hearing examination of Claimant cannot be considered for purposes of this decision. McClimans v. S & G Produce, Inc., and Idaho State Insurance Fund, I.C. No. 2004-507936 and I.C. No. 2005-506274 (Referee Taylor) (Filed 7/27/07) (emphasis supplied).

The rationale for J.R.P. 10 (E) (4) is fundamental fairness. The rule prevents both litigants from launching surprise ambush attacks against their opponents by **developing or manufacturing** new medical evidence after a hearing that the other party does not have the opportunity to rebut. This rationale of fundamental fairness is what

requires all parties to make full pre-trial disclosure of expert opinion and then supplement those disclosures if the opinions are modified, expanded or otherwise altered:

Idaho Rule of Civil Procedure 26(b)(4) provides that a party can request that the opposing party set forth the identity of the opposing party's expert witnesses and **the substance of the experts' opinions**. Rule 26(e) imposes a duty on parties to seasonably update interrogatory responses and provides that the "trial court may exclude the testimony of witnesses or the admission of evidence not disclosed by a required supplementation of the responses of the party."

This Court has previously held that a trial court abused its discretion and **committed reversible error by allowing expert testimony, which was not properly disclosed** in violation of Rule 26. *Radmer v. Ford Motor Co.*, 120 Idaho 86, 813 P.2d 897 (1991) *Clark, supra* at 137 Idaho 156-157, 45 P.3d 812-813 (emphasis supplied). ...

On appeal, the defendant argued that the trial court committed reversible error by allowing Pool to testify regarding his reconstruction theory. In its analysis of the issue, this Court quoted the language of I.R.C.P. 26(e)(1), stating that the rule "unambiguously imposes a continuing duty to supplement responses to discovery with respect to the **substance and subject matter of an expert's testimony where the initial responses have been rejected, modified, expanded upon, or otherwise altered in some manner**." *Id.* (citations omitted). This Court then quoted the advisory committee to the federal rules, which in reference F.R.C.P. 26 provides:

In cases of this character [involving expert testimony], a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation Similarly, **effective rebuttal requires advance knowledge of the line of testimony of the other side**. If the latter is foreclosed by a rule against discovery, the narrowing of issues and **elimination of surprise** which discovery normally produces are frustrated. *Id.* (quoting Advisory Committee Notes, rule 26, Fed. Rules Civ.Proc., 28 U.S.C.A.) (alterations in original).

This Court also quoted one scholar for the proposition that:

It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, ***particularly when expert witnesses are involved***. . . . Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he [or she] must have some idea of the bases of that opinion and the data relied upon. If an attorney is ***required to await examination at trial*** to get this information, he [or she] often will have ***too little time to recognize and expose vulnerable spots in the testimony***. *Id.* (quoting Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455, 485 (1962) (ellipses in original); see also *Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 217-218, 846 P.2d 207, 219-20 (1993) (noting that I.R.C.P. 26(e)(1) obligates counsel to supplement discovery responses, particularly the substance of an expert's testimony). *Id.* at 137 Idaho 157-158, 45 P.3d 813-814 (emphasis supplied). ...

Because this was the first time that this theory was advanced that Corey did not have the hole in his intestine at the time of his release, **Appellants did not have an opportunity to prepare cross-examination or to offer rebuttal testimony**. In fact, when Bourquard testified, Appellants' expert witnesses had been excused and had apparently left town, so, **Appellants were prejudiced by the ruling that allowed the testimony**. Although the trial judge perceived the issue of the testimony as one of discretion, his indication that the burden was on Appellants to file a motion to compel the substance of the testimony was outside the bounds of his discretion and it fails the second part of the Sun Valley test. We therefore reverse and order a new trial on that basis. *Id.* at 137 Idaho 159, 45 P.3d 815 (emphasis supplied).

Based on the holding in Clark, it would be reversible error for the Commission to rely on new or different medical opinions expressed for the first time during Dr. Weiss's post-hearing deposition which were not properly disclosed in Dr. Weiss's pre-hearing 10/1/08 IME report because the Claimant did not have an opportunity to prepare for these new medical opinions on cross-examination and did not have an opportunity to offer rebuttal testimony or opinions from the Claimant's treating physicians. In its Order On Reconsideration the Industrial Commission should exclude from consideration all opinions expressed by Dr. Weiss during his 1/27/09 post-hearing deposition which were not **known by or available to** the Claimant at the time of the December 19, 2008 hearing; i.e., which were not set forth in Dr. Weiss's 10/1/08 IME report.

If the Industrial Commission does not enforce J.R.P. 10 (E) (4) against the Defendants in order to prevent them from **manufacturing or developing** new medical evidence post-hearing, that would give the Defendants a unfair advantage in these proceedings and violate the Claimant's substantive rights because the Claimant would be effectively deprived of the opportunity to rebut the new medical opinions which surfaced for the first time in Dr. Weiss's January 27, 2009 post-hearing deposition.

If the Industrial Commission is going to base its final decision in this matter solely on a comparative weighing of the medical experts' opinions as suggested by the Defendant in their Response, then the only opinions that should be compared and weighed are those opinions that had been properly disclosed and which were **known by or available to** the parties at the time of the December 19, 2008 hearing – not those new medical opinions which were **manufactured or developed** by Dr. Weiss and surfaced for the first time during his January 27, 2009 post-hearing deposition in violation of I.R.C.P. 26(b)(4) and J.R.P. 10(E)(4).

On Reconsideration, the Industrial Commission should enforce J.R.P. 10 (E) (4) and exclude from the record all post-hearing medical opinions expressed by the Defendants' IME medical expert Michael S. Weiss, M.D. during his January 27, 2009 post-hearing deposition to the extent those medical opinions deviated from, expanded upon or were different from the medical opinions expressed by Dr. Weiss in his 10/01/2008 IME report.

(II) **CLAIMANT'S MOTION TO STRIKE UNDISCLOSED MEDICAL OPINIONS**

Based on the evidence before the Commission and the arguments set forth above, the Claimant hereby moves the Industrial Commission for an Order excluding from consideration all medical opinions set forth in Dr. Weiss's January 27, 2009 post-hearing deposition to the extent that those opinions modify, alter, expand the scope of or are different from the 4 medical opinions set forth in Dr. Weiss's 10/1/08 IME report. The Claimant is

allowed to make this objection at any time prior to entry of a final and appealable decision. See McClimans v. S & G Produce, Inc., and Idaho State Insurance Fund, I.C. No. 2004-507936 and I.C. No. 2005-506274 (Referee Taylor) (Filed 7/27/07).

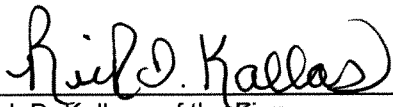
The Defendants in this case did not show good cause and obtain an Order from the Commission allowing them to **develop or manufacture** new medical causation evidence post-hearing beyond the medical opinions set forth in Dr. Weiss's 10/1/08 IME report. Therefore, Dr. Weiss's post-hearing medical opinions, to the extent they deviate from the medical opinions in his 10/1/08 IME report, must be excluded.

CONCLUSION

Based on the record before the Commission and the Defendants failure to provide any meaningful legal analysis in response to the Claimant's Motion For Correction of Erratum and Motion For Reconsideration, the Claimant respectfully requests that the Industrial Commission enter the Orders of Erratum and Orders of Reconsideration requested in his June 26, 2009 Motion and an Order Striking those medical opinions set forth in Dr. Weiss's 1/27/09 post-hearing deposition which had not been properly disclosed prior to the December 19, 2008 Hearing.

RESPECTFULLY SUBMITTED this 8th day of July, 2009.

Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.

By 
Rick D. Kallas - of the Firm
Attorneys for Claimant

Certificate of Service

I HEREBY CERTIFY that on the 8th day of July, 2009, I served Claimant's Reply To Defendants' Response To Claimant's Motion For Correction of Erratum and Motion For Reconsideration and Claimant's Motion To Strike by the method indicated below and addressed to the following:

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Employees of the Liberty Mutual Group

Attorney for Defendants

**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

ROBERT A. WATSON,

Claimant,

vs.

JOSLIN MILLWORK, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORP.,

Surety,

Defendants.

I.C. No. 2008-017579

**RECEIVED
JUL 14 2009
INDUSTRIAL COMMISSION
OF IDAHO**
**RESPONSE TO
CLAIMANT'S MOTION TO
STRIKE UNDISCLOSED
MEDICAL OPINIONS**

COME NOW, Defendants, Joslin Millwork, Inc., and Liberty Northwest Insurance Corp., by and through their Attorney of Record and, pursuant to JRP Rule 3(F) and hereby respond to Claimant's new Motion to Strike contained within his July 8, 2009 Reply in the above captioned case.

Claimant's generic attack on Dr. Weiss' deposition testimony is unfounded. Without identifying which portions of Dr. Weiss' deposition he finds objectionable at this very late stage in these proceedings, Claimant argues that IRCP Rule 26(b)(4) precludes some unspecified portion of Dr. Weiss' deposition testimony. Claimant must, though, be unaware of the Supreme Court's holding in *Page v. McCain Foods, Inc.*, 145 Idaho 302, 311, 179 P.3d 265, 274 (2008) recognizing that actions before the Industrial Commission are not governed by the Idaho Rules of Civil Procedure.

However, Page cannot rely on I.R.C.P. 6(a). The Idaho Rules of Civil Procedure govern in the district courts and the magistrate's division of the district courts. I.R.C.P. 1(a). The Industrial Commission is not a division of the district court. See I.C. § 72-501(1) (statutory creation of the Industrial Commission as an executive department of the state government). Furthermore, the Commission has the authority to "promulgate and adopt reasonable rules and regulations involving judicial matters" and to the extent the regulations are consistent with law, they are binding.

As the Commission is well aware, proceedings before the Commission differ substantially from proceedings before a court. The whole practice of capturing the vast majority of expert testimony post the judicial proceeding would seem, at minimum, unconventional to the typical civil litigator unfamiliar with Idaho workers' compensation practice and procedure. Nevertheless, the Commission has, within its statutory authority, promulgated an entire procedural rule governing the conduct of post-hearing depositions. See, JRP Rule 10(E). It is not IRCP Rule 26(b)(4) which governs to conduct of post-hearing expert depositions, but the Commission's own JRP Rule 10(E).

Claimant then seeks to instruct the Commission on its obligation pursuant to JRP Rule 10(E)(4) by invoking *McClimans v. S&G Produce, Inc*, IC 2004-507936, 2007 WL 2652003 (filed July 27, 2007). *McClimans* is, though, clearly distinguishable on its face. In *McClimans*, Referee Taylor was confronted with a situation in which a physician

sought to testify, post hearing, regarding the results of a post hearing examination. There is no implication in the instant case that Dr. Weiss based any opinion to which he testified at deposition upon anything other than medical records reviewed before hearing and clearly outlined in his 10/01/08 IME report, upon his own examination of the Claimant as set forth in his 10/01/08 IME report, or upon exhibits and evidence admitted at hearing; there is no showing of additional documents provided or reviewed by Dr. Weiss post hearing and no showing of and additional examination or evaluation of Claimant's condition as there was in *McClimans*. Dr. Weiss' deposition testimony clearly comports with JRP Rule 10(E)(4) language allowing "[e]xperts testifying post-hearing" to base opinions upon "exhibits and evidence admitted at hearing...."

Further, Dr. Weiss deposition testimony offered Claimant no undo surprise. The pivotal issue upon which Referee Powers and the Commission based their decision was whether Claimant had carried his burden of proving that his occupational disease was incurred in his employment with Defendant Joslin.

The major hurdle facing Claimant is set out in question number 4 posed by claimant to Dr. Frizzell: "In my opinion, do I believe that Mr. Watson's disease was incurred in or arose out of and in the course of his employment with Joslin Millwork, Inc.?" Dr. Frizzell responded, "Yes." The Referee questions how Dr. Frizzell could reach that conclusion. Degenerative disc disease and facet arthritis develop over time. In fact, Claimant's saw a chiropractor for low back pain on December 13, 2005, and was taken off work for a few days. Dr. Meissner's records from December 2005 reflect that Claimant's low back pain arose without accident and was first noted on a Sunday, while at home. Also, prior to the commencement of his employment by Joslin, Claimant had complained to another employer that he hoped to get out of the drywall business because it was causing him low back pain. Claimant's underlying degenerative joint disease and arthritis was certainly present in November 2007 and was not caused by his work.

FOF/COL ¶ 11.


While his deposition testimony is admittedly lengthier than his 10/01/08 IME report, it cannot be said that the two differ in any meaningful way. The deposition testimony simply provides the analytic framework Dr. Weiss utilized in reaching his opinions and is perfectly consistent with the purpose for allowing post hearing expert depositions in Idaho workers' compensation proceeding. If an expert is precluded from expanding upon or otherwise altering opinions and the basis therefore as already set forth in documents admitted in evidence to the extent Claimant seems to suggest, then one must wonder at why the Commission allows post-hearing expert depositions at all. Clearly, the post-hearing expert deposition is for the purpose of allowing an expert the opportunity to explain their methodology, analysis and opinions and for opposing counsel to have an opportunity to explore, question and seek to get the expert to modify or alter an opinion set forth in some document already in evidence before the Commission.

Does Claimant suggest, had he been able to get Dr. Weiss to testify at deposition that, upon reconsideration or upon consideration of evidence adduced at hearing, the opinions he stated in his IME report were simply dead wrong, that such deposition testimony ought be stricken as a modification of or alteration to opinions where such modification or alteration was not disclosed prior to hearing? Most certainly not! Nor do Defendants believe that Claimant would suddenly become offended and move to strike such testimony upon the basis that the newly revised was developed post hearing. It makes no more sense to here argue that the very consistent deposition testimony given by Dr. Weiss ought be stricken.

Claimant has not specified any portion of Dr. Weiss' deposition testimony which does not comport with JRP Rule 10(E)(4) and has failed to demonstrate any meaningful basis upon which the Commission ought now alter its longstanding acceptance of post-hearing expert depositions in workers' compensation proceedings. Thereupon, Defendants urge the Commission to deny Claimant's current motion to strike.

DATED this 13th day of July, 2009.


LAW OFFICES OF HARMON, WHITTIER & DAY

By: 
E. Scott Harmon
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day July, 2009, a true and correct copy of the foregoing document was served upon the following by first class mail, postage prepaid at the address indicated:

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INDUSTRIAL COMMISSION

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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| ROBERT A. WATSON, |) | |
| |) | |
| Claimant, |) | I.C. No. 2008-017579 |
| |) | |
| vs. |) | CLAIMANT'S REPLY TO DEFENDANTS' |
| |) | RESPONSE TO CLAIMANT'S MOTION TO |
| JOSLIN MILLWORK, INC., |) | STRIKE |
| |) | |
| Employer, |) | |
| |) | |
| and |) | |
| |) | |
| LIBERTY NORTHWEST INSURANCE |) | |
| CORPORATION, |) | |
| |) | |
| Surety, |) | |
| Defendants. |) | |
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COMES NOW, Claimant, Robert A. Watson, by and through his attorney, Rick D. Kallas, of Ellsworth, Kallas, Talboy and DeFranco, PLLC, and pursuant to I.R.C.P. 26(b)(4), J.R.P. 3, J.R.P. 7 and J.R.P. 10 (E) (4) hereby submits the Claimant's Reply to Defendants' Response To Claimant's Motion To Strike The Post-Hearing Deposition Opinions of Defendants' IME Medical Expert Not Properly Disclosed Prior To Hearing:

(A) INTRODUCTION

The Defendants have objected to the Claimant's Motion To Strike on the following grounds:

- (1) The Defendants do not have any obligation to comply with the Expert Witness disclosures required by I.R.C.P. 26(b)(4) because the Idaho Rules of Civil Procedure do not apply in Idaho workers' compensation proceedings (Def. Resp. p. 2);
- (2) The rationale of full pre-hearing disclosure of expert witness opinions required by J.R.P. 10(E)(4) and McClimans v. S & G Produce, Inc., and Idaho State Insurance Fund, I.C. No. 2004-507936 and I.C. No. 2005-506274 (Referee Taylor) (Filed 7/27/07) does not apply because the facts of the McClimans' case are distinguishable (Def. Resp. p. 3);
- (3) The new opinions expressed by Dr. Weiss during his 1/27/09 post-hearing deposition were not really new opinions. Dr. Weiss just expanded upon or explained the analytical framework for the opinions expressed in his 10/1/08 IME report (Def. Resp. p. 4); and,
- (4) Claimant did not specifically identify the new medical opinions expressed by Dr. Weiss for the first time during his 1/27/09 post-hearing deposition which had not been properly disclosed pre-hearing as required by I.R.C.P. 26(b)(4) and J.R.P. 10(E)(4) (Def. Resp. p. 5).

(B) CLAIMANT'S REBUTTAL ARGUMENTS

The Defendants first argument is that the expert witness disclosure requirements of Rule 26(b)(4) of the Idaho Rules of Civil Procedure have absolutely no application to Idaho workers' compensation claims. In support of that position, the Defendants cite Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008). Of course, the Court in Page was not discussing the mandatory expert witness disclosure requirements of I.R.C.P. 26(b)(4). The Court was discussing the time computation requirements of I.R.C.P. 6(a). The time computation requirements of I.R.C.P. 6(a) are not the subject of the Claimant's Motion To Strike. While the time computation rule set forth in I.R.C.P. 6(a) may not apply to workers' compensation claims, that does not mean that the mandatory expert witness disclosure requirements of I.R.C.P. 26(b)(4) likewise do not apply.

J.R.P. 7 expressly states that the expert witness disclosure requirements of I.R.C.P. 26(b)(4) apply to Idaho workers' compensation claims:

"Procedural matters relating to discovery, except sanctions shall be controlled by the appropriate provisions of the Idaho Rules of Civil Procedure". (J.R.P. 7(C) (emphasis supplied)).

The Defendants next argue that the full disclosure rationale of J.R.P. 10(E)(4) does not apply to this case because the facts in the McClimans case are distinguishable. While it may be true that the facts in McClimans are distinguishable – the principle at stake is the same. Just like the Claimant McClimans tried to manufacture or create new medical evidence post-hearing, the Defendants in this case have manufactured and / or created new medical opinions post-hearing. Again, the issue is fundamental fairness. Is the Industrial Commission going to allow litigants to introduce new medical opinions for the first time during post-hearing depositions when those opinions have not been properly disclosed at least 10 days prior to hearing in accordance with I.R.C.P. 26(b)(4), J.R.P. 10(C) and J.R.P. 10(E)(4)?

The Claimant agrees that Dr. Weiss should be allowed to explain his methodology and his analytical framework in his post-hearing deposition. However, by operation of J.R.P. 10(E)(4), his explanation of the rationale for his opinions should be limited in scope to those opinions that were properly disclosed pre-hearing. Dr. Weiss should not be allowed to introduce completely new or different medical opinions for the first time in a post-hearing deposition. J.R.P. 10(E)(4) proscribes the Defendants from manufacturing or creating new medical opinions during a post-hearing deposition which were not properly disclosed at least 10 days prior to hearing.

The rationale for J.R.P. 10(E)(4) is the same as I.R.C.P. 26(b)(4) – fundamental fairness: i.e., the Claimant cannot be prepared to cross-examine the Defendants' IME expert about undisclosed medical opinions and the Claimant cannot present rebuttal opinion from his own medical experts since the Defendants' IME expert's deposition is taken at the conclusion of the evidence just before the evidentiary record is closed.

Finally, the Defendants argue that the Claimant did not specifically identify the new medical opinions expressed by Dr. Weiss for the first time during his 1/27/09 post-hearing deposition. The Defendants are mistaken. In his Reply / Motion To Strike, the Claimant quoted from Dr. Weiss's 10/1/08 IME report verbatim and then specifically listed the 4 medical opinions expressed by Dr. Weiss in his 10/1/08 IME report. After listing the 4 opinions which had been properly disclosed, the Claimant asked the Industrial Commission to exclude all new and / or different medical opinions which deviated from those 4 properly disclosed opinions.

The 4 opinions expressed by Dr. Weiss in his 10/1/08 IME report were listed by Claimant in his Reply / Motion To Strike as follows:

1. It would be within the standard of care for the Claimant to have the surgery recommended by Dr. Frizzell;
2. Back pain and spinal arthritis are common in the general population;
3. Heavy work is exercise and exercise is generally thought to be beneficial; and,

4. Sedentary workers have high rates of back pain complaint and disability¹.

The Claimant asked the Industrial Commission to exclude every new and / or different medical opinion disclosed by Dr. Weiss for the first time during his 1/27/09 post-hearing deposition because those opinions had not been disclosed in his 10/1/08 IME report. The new opinions expressed by Dr. Weiss for the first time during his 1/27/09 post-hearing deposition included, but were not limited to, the following medical opinions that the Industrial Commission relied on in drafting its June 8, 2009 decision:

1. The Claimant's lumbar spine degenerative disc disease and L5-S1 disc herniation were caused by **heredity** (§ 11 of decision);
2. The Claimant's lumbar spine degenerative disc disease and L5-S1 disc herniation were caused by **age** (§ 11 of decision);
3. The Claimant's lumbar spine degenerative disc disease and L5-S1 disc herniation were caused by **diet** (§ 11 of decision);
4. The Claimant's lumbar spine degenerative disc disease and L5-S1 disc herniation were caused by **smoking** (§ 11 of decision);
5. The Claimant's lumbar spine degenerative disc disease and L5-S1 disc herniation were caused by **obesity** (§ 11 of decision);
6. The Claimant's physical findings do not support the conclusion that his free fragment of disc material was causing his back pain (§ 9 of decision);
7. Dr. Weiss did not see any connection between the Claimant's need for back surgery and his employment (§ 10 of decision); and,
8. High impact activities can lead to the progression of underlying arthritis, but do not actually cause the underlying arthritis (§ 10 of decision).

The listing above is illustrative and not intended to be exhaustive but it does confirm that Dr. Weiss issued new and / or different medical opinions in his post-hearing deposition which had not been properly disclosed at least 10 days prior to hearing in violation of I.R.C.P. 26(b)(4) and J.R.P. 10(E)(4). Furthermore, it demonstrates that the Industrial Commission relied on those undisclosed medical opinions in support of its June 8, 2009 decision.

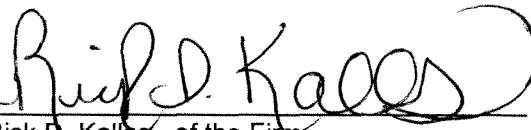
If the Industrial Commission limited its consideration to the 4 medical opinions which had been properly disclosed by the Defendants in Dr. Weiss's 10/1/08 IME report, then, *a fortiori*, the Claimant would be the prevailing party in this case because he introduced medical evidence on each element in the prima facie case and met his burden of proof. Whereas, the Defendants failed to offer any affirmative defense because Dr. Weiss did not address any of the elements in the prima facie case and did not address the causation question in his 10/1/08 IME report.

¹ The Defendants did not disagree with this listing of the 4 issues expressed by Dr. Weiss in his 10/1/08 IME report in their Response.

If the new and / or different medical opinions which surfaced for the first time during Dr. Weiss's post-hearing deposition are removed from this case, the Defendants have no defense to this claim. It would be fundamentally unfair for the Industrial Commission to DENY the Claimant's Motion To Strike and thereby allow the Defendants to cure all of the defects with Dr. Weiss's 10/1/08 IME report by introducing new medical opinions for the first time during a post-hearing deposition. The Claimant's Motion To Strike should be granted.

RESPECTFULLY SUBMITTED this 20th day of July, 2009.

Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.

By 
Rick D. Kallas - of the Firm
Attorneys for Claimant

Certificate of Service

I HEREBY CERTIFY that on the 20th day of July, 2009, I served Claimant's Reply To Defendants' Response To Claimant's Motion To Strike by the method indicated below and addressed to the following:

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☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile


Tiffany Llanos

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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| ROBERT A. WATSON, |) | |
| |) | |
| Claimant, |) | IC 2008-017579 |
| |) | |
| v. |) | |
| |) | |
| JOSLIN MILLWORK, INC., |) | |
| |) | ORDER ON RECONSIDERATION |
| Employer, |) | AND PENDING MOTIONS |
| |) | |
| and |) | |
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| LIBERTY NORTHWEST INSURANCE |) | FILED |
| CORPORATION, |) | |
| |) | OCT 14 2009 |
| Surety, |) | |
| |) | INDUSTRIAL COMMISSION |
| Defendants. |) | |
| |) | |

On June 26, 2009, Claimant filed a Motion for Correction of Erratum and Motion for Reconsideration and brief regarding the Industrial Commission's decision filed June 8, 2009, in the above referenced case. Defendants filed a response on July 7, 2009. On July 8, 2009, Claimant filed a reply which also included Claimant's Motion to Strike Undisclosed Medical Opinions. Defendants responded to Claimant's motion to strike on July 14, 2009, and Claimant replied on July 20, 2009.

At hearing, Claimant alleged that he incurred a compensable occupational disease performing heavy and repetitive work as a sawyer/assembler/cabinet maker/delivery driver that resulted in a herniated lumbar disc requiring surgery. Defendants argued that the need for Claimant's surgery is related to his underlying degenerative disc disease and facet arthritis, and not related to Claimant's work with Employer.

ORDER ON RECONSIDERATION AND PENDING MOTIONS - 1

The medical evidence established that Claimant treated with Dr. Bates, a physiatrist, for approximately one month before being referred to Dr. Frizzell, a neurosurgeon. Dr. Frizzell examined Claimant and recommended a microdiscectomy at L5-S1. Surety denied authorization for the surgery, and as of the date of the hearing it had not been performed. Dr. Frizzell responded affirmatively to a letter outlining the legal requirements of finding Claimant's condition an occupational disease. Dr. Weiss performed an IME, at Surety's request, and found no connection between Claimant's need for surgery and his employment.

The Commission found that Claimant's underlying degenerative joint disease and arthritis were present in November 2007 and were not caused by his work. Dr. Weiss rendered^{ed} a well-reasoned expert opinion which opined that Claimant's degenerative disc disease and facet arthritis developed over time. Based substantially upon Dr. Weiss's opinion of Claimant's medical history and the 2008 MRI, the Commission found no medical causation, and while Claimant's work may have speeded the progress, Nelson precludes recovery as there is no accident. Further, the Commission found no particular machine, or constant repetitive activity is implicated in causing Claimant's disease. The Commission concluded that Claimant failed to prove the need for his lumbar surgery is the result of an occupational disease.

Claimant's Motion for Correction

Claimant requests an order to correct the Commission's decision on several points detailed in his motion. Defendants have made no specific response to these requests. After review of the record the Commission GRANTS, in part, Claimant's request for correction and will make the following corrections to the decision issued June 8, 2009. Any requests not addressed below are DENIED.

1. On page 2, under the heading Evidence Considered, add to the list of evidence the

testimony of Claimant at the hearing. Thus, the first item in the list of evidence considered will read: "1. The testimony of Claimant at the hearing and Claimant's Exhibits 1-14 admitted at the hearing."

2. On page 4, in the first line of paragraph 5, change the date from January 27, 2008 to January 17, 2008.
3. On page 7, nine lines into paragraph 11, states, "Also, prior to the commencement of his employment by Joslin, Claimant had complained to another employer that he hoped to get out of the drywall business because it was causing him low back pain." Claimant argues this finding is inaccurate. Claimant was questioned about this statement and his testimony was that prior work caused pain in his elbow but not his back. Hearing Transcript, p. 17. Yet, the sentence quoted above is supported in the record by the statement of Claimant's production supervisor. Claimant's Exhibit 2.

Claimant's Motion for Reconsideration

In his motion for reconsideration, Claimant argues that 1) the Commission erred when it concluded Claimant failed to prove his lumbar spine injury was an occupational disease incurred at work, 2) the Commission erred by holding that Nelson and its progeny bar recovery, and 3) the Commission erred by concluding the hazards of Claimant's lumbar spine disease were not characteristic of and peculiar to his job.

Defendants argue that Claimant's request for a second bite at the apple should be rejected. The Commission's decision to find Dr. Weiss more persuasive than Dr. Frizzell is supported by the record. Defendants contend that the record supports the Commission's relative weighing of the opinions of Drs. Weiss and Frizzell and ultimate finding that Dr. Weiss's opinion was better

reasoned, more fleshed out, and more persuasive than the conclusory opinions set forth by Dr. Frizzell.

In support of his motion Claimant has provided a detailed recitation of the facts Claimant feels are most important and persuasive. Claimant addresses nearly every paragraph of the decision and requests each be amended to more accurately reflect the evidence in the record. The Commission acknowledges that the decision does not state every fact in evidence, but it does set forth what the Commission found to be the substantial and persuasive evidence to address the issues at hand.

First, Claimant argues that the Commission erred when it concluded Claimant failed to prove his lumbar spine injury was an occupational disease incurred at work. Claimant contends that he presented overwhelming evidence to prove his case. Claimant's testimony, Dr. Frizzell's letter, and other evidence support Claimant's argument. The Commission acknowledges that Claimant presented evidence to support his case, but the Commission was not persuaded by Dr. Frizzell's opinion. Claimant argues that the Commission discredited Dr. Frizzell's opinion merely because he was not deposed. There is no requirement for Claimant to depose Dr. Frizzell. However, the letter submitted by Dr. Frizzell provided little elaboration on the facts and science supporting Dr. Frizzell's apparent conclusions on the causation question at the heart of this case. The causation letter simply restated the questions, as phrased by Claimant's counsel, and stated "yes" as a response with no explanation of Dr. Frizzell's reasoning. When viewed in context of the entire case, the Commission was persuaded by Dr. Weiss's observations and opinions that Claimant's suffered from preexisting degenerative disease and facet joint arthropathy.

Claimant contends that the x-ray taken by Dr. Meissner on December 13, 2005, which stated

that the lumbar spine was negative for pathology, proves that Claimant did not suffer from preexisting degenerative disc disease and arthritis. An x-ray does not image soft tissue in the same manner as an MRI. The 2008 MRI results coupled with Dr. Weiss's opinion support the Commission's finding that Claimant suffered from preexisting degenerative disease that was not caused by his work for Employer.

Second, Claimant contends the Commission erred by holding that Nelson and its progeny bar recovery. Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994). The Commission adopted Dr. Weiss's opinion that Claimant's underlying degenerative joint disease and arthritis were not caused by his work. The degenerative joint disease and arthritis were medically documented in the 2008 MRI as explained by Dr. Weiss. Dr. Meissner's note stating that Claimant's 2005 x-ray was negative for pathology does not provide enough support to override Dr. Weiss's opinion and the 2008 MRI. Even if it were acknowledged that Claimant's condition was aggravated by the demands of his employment, Nelson bars recovery without an accident.

The Commission found that Claimant suffers from a preexisting condition or susceptibility. Claimant saw a chiropractor for low back pain in December 2005 and was taken off work for a few days. Per Employer, during Claimant's initial interview, prior to starting work with Employer, Claimant commented that he had experienced soreness in his back due to his work installing sheetrock. Claimant's Exhibit 2. According to Dr. Weiss, Claimant's multilevel degenerative disc disease and facet arthritis took place over years and years, and was not something that came on acutely in November of 2007. Dr. Weiss's Depo. pp. 19, 23. The record as whole establishes that Claimant suffers from a preexisting condition or susceptibility. Thus, without evidence of an accident Claimant is not entitled to compensation for an aggravation of his preexisting condition.

Claimant argues that the Nelson defense was not a noticed issue and the defense was waived by Defendants. The Nelson defense was not a noticed issue but whether Claimant incurred an occupational disease was a noticed issue. The Supreme Court's ruling in Nelson is not an optional law that the Commission can ignore if the parties so request. Nelson deals with the threshold compensability of an occupational disease. See Koch v. Micron Technology, 136 Idaho 885, 42 P.3d 678 (2002). The Commission found that Claimant suffered from a pre-existing condition, thus applied the holding in Nelson, as it would apply any precedent in good standing.

Third, Claimant argues that the Commission erred by concluding the hazards of Claimant's lumbar spine disease were not characteristic of and peculiar to his job. The Commission agrees that Claimant performed difficult manual labor while working for Employer. Claimant sets forth the physical requirements of his work as well as the time frame and rate at which the work was performed. Claimant stood while reaching and lifting sheets of particle board for 6 hours per day. These facts were previously presented and the same were used as a basis for the Commission's conclusion. The evidence in the record does not support a finding that Claimant's job constitutes a risk of injury that is distinguishable from the general run of blue collar work.

The Commission has reviewed the record with a focus on the concerns that Claimant has raised in the motion for reconsideration and remains persuaded that the facts support the decision issued on June 8, 2009. The Commission's analysis took into account all the documentary evidence and testimony and found that Dr. Weiss's well-reasoned expert opinion is entitled to greater weight. The Commission's decision concluded that Claimant failed to prove that the need for his lumbar surgery is the result of an occupational disease arising out of and in the course of his employment. Although Claimant disagrees with the Commission's findings and conclusions, the Commission

finds the decision of June 8, 2009, is supported by substantial evidence in the record and Claimant has presented no persuasive argument to disturb the decision.

Claimant's Motion to Strike

Claimant's reply brief filed July 8, 2009 includes a motion to strike undisclosed medical opinions. Claimant avers that any new opinions expressed by Dr. Weiss for the first time during his post-hearing deposition should be stricken. Claimant contends these include Dr. Weiss's opinion on whether Claimant's lumbar spine degenerative disc disease and herniation were caused by heredity, age, diet, smoking, and obesity. Claimant argues that to the extent any opinions given during deposition modify, alter, expand the scope, or are different from the medical opinions set forth in his IME report, the altered opinions should be stricken.

Claimant's heredity, age, diet, smoking status, and weight was not evidence developed following hearing. The evidence was known by or available to the parties at the time of hearing.

Experts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing but not on evidence developed following hearing. JRP 10 (E)(4). Claimant does not claim that Dr. Weiss was privy to new exhibits or evidence created post-hearing, but that Dr. Weiss developed or manufactured new medical causation opinions post-hearing. Defendants disclosed Dr. Weiss as an expert and his report was developed on October 1, 2008, well before the hearing on December 19, 2008. Dr. Weiss's deposition is undeniably more voluminous than his report. Yet, the purpose behind the post-hearing physician deposition is to allow parties the ability to further flesh out the details behind that which is stated in a report. Details and explanations, which may not be included in the report, may be of great importance to a party's case. Dr. Weiss was deposed post-hearing but after a review of his deposition, the Commission finds that the opinions and explanations

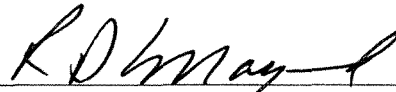
expressed were based on evidence admitted prior to or at hearing. Further, we find the explanations in the deposition do not involve new medical causation opinions. Therefore, Claimant's motion to strike is DENIED.

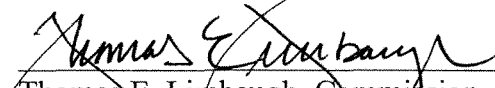
Based upon the foregoing reasons, Claimant's Motion for Correction is GRANTED in part, and DENIED in part; Claimant's Motion for Reconsideration is DENIED; and Claimant's Motion to Strike is DENIED.


IT IS SO ORDERED.

DATED this 14th day of October, 2009.

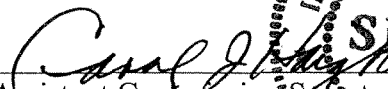
INDUSTRIAL COMMISSION



R.D. Maynard, Chairman


Thomas E. Limbaugh, Commissioner


Thomas P. Baskin, Commissioner

ATTEST:


Assistant Commission Secretary



The seal is circular with a dotted border. Inside the border, the words "INDUSTRIAL COMMISSION" are written in a semi-circle at the top, and "STATE OF IDAHO" is written in a semi-circle at the bottom. In the center of the seal, the word "SEAL" is written in large, bold, capital letters.

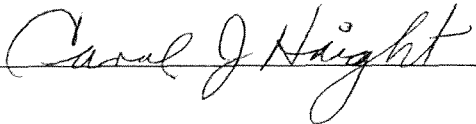
CERTIFICATE OF SERVICE

I hereby certify that on 14th day of October, 2009, a true and correct copy of the foregoing **ORDER ON RECONSIDERATION AND PENDING MOTIONS** was served by regular United States Mail upon each of the following:

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Attorneys for Appellant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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| ROBERT A. WATSON, |) | |
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| Claimant / Appellant, |) | I. C. No. 2008-017579 |
| |) | |
| vs. |) | |
| |) | NOTICE OF APPEAL |
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| JOSLIN MILLWORK, INC., |) | |
| |) | |
| and |) | |
| |) | Filing Fee: \$86.00 |
| LIBERTY NORTHWEST INSURANCE |) | |
| CORPORATION, |) | |
| |) | |
| Defendants / Respondents. |) | |
| |) | |

**TO: THE ABOVE NAMED RESPONDENTS, JOSLIN MILLWORK, INC., AND
LIBERTY NORTHWEST INSURANCE CORPORATION, AND THEIR
ATTORNEY, E. SCOTT HARMON, AND THE SECRETARY OF THE
INDUSTRIAL COMMISSION.**

NOTICE IS HEREBY GIVEN THAT:

1. The above named Claimant / Appellant, ROBERT A. WATSON, appeals against the above named Defendants / Respondents to the Idaho Supreme Court from the Industrial Commission's Findings of Fact, Conclusions of Law and Recommendation, and Order, filed in the above entitled proceeding on the 8th day of June, 2009, and the Industrial Commission's Order on Reconsideration and Pending Motions filed in the above entitled proceeding on the 14th day of October, 2009, R. D. Maynard, Chairman, presiding.
2. The Claimant / Appellant has a right to appeal to the Idaho Supreme Court, and the judgments and orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(d) I.A.R.
3. Preliminary statement of the issues on appeal:
 - (a) Did the Industrial Commission err when it concluded that the Claimant failed to prove that the need for his lumbar surgery was the result of an occupational disease arising out of and in the course of his employment when the record contained overwhelming evidence that Claimant had contracted and / or incurred a low back occupational disease as the result of exposure to hazards which were characteristic of and peculiar to his job as a Sawyer / Assembler for Joslin Millwork, Inc.?
 - (b) Was it erroneous for the Industrial Commission to conclude that the Claimant had failed to meet his burden of proving a compensable occupational disease claim when the Defendants failed to present any facts and / or medical evidence at the December 19,

2008 Emergency Hearing which rebutted the Claimant's proof on any element in the prima facie case for a compensable occupational disease claim?

- (c) Did the Industrial Commission err by finding that the hazards of the claimant's job were sufficient to aggravate and / or speed the progression of his lumbar spine disease but those same causal factors were not sufficient to be an original cause of the Claimant's lumbar spine disease without explaining the difference between a hazard's ability to be a mere aggravating factor as opposed to an original cause in a manner that would allow effective or meaningful appellate review?
- (d) Did the Industrial Commission err by finding that the hazards of the Claimant's job were not peculiar to and characteristic of his job because no particular machine or constant repetitive activity were implicated in causing the Claimant's lumbar spine disease when the record contained substantial and competent evidence that Claimant operated a specific beam saw machine in a static position in a confined space and engaged in constant and / or repetitive heavy lifting, twisting and bending at the waist activities?
- (e) Did the Industrial Commission err by treating the medical opinions set forth in defense medical expert, Michael S. Weiss, M.D.'s October 1, 2008 IME report as substantial and competent evidence when Dr. Weiss failed to address any of the elements in the prima facie case for a compensable occupational disease claim in his IME report?
- (f) Did the Industrial Commission err by adopting the medical opinions of defense medical expert, Michael S. Weiss, M.D., and treating them as substantial and competent evidence when Dr. Weiss admitted under oath during his post-hearing deposition that his opinions

were not supported by proper factual foundation because he did not know a single fact about the hazards of the Claimant's lumbar spine disease that the Claimant was exposed to in his job as a Sawyer / Assembler for Joslin Millwork, Inc. before he issued his opinions?

- (g) Did the Industrial Commission violate the Claimant's right to procedural due process by denying his Motion To Strike and allowing the Defendants to create, develop or manufacture new medical opinion evidence from Dr. Weiss during his post-hearing deposition when that medical opinion evidence was not known by or made available to the claimant at the time of the December 19, 2008 Emergency Hearing in direct violation of J.R.P. 10 (E) (4); I.R.C.P. 26 (b) (4) and I.R.C.P. 26 (e)?
- (h) If it was not reversible error for the Commission to allow the Defendants to create, develop or manufacture new medical opinion evidence from Dr. Weiss during his post-hearing deposition, did the Industrial Commission err by completely overlooking those portions of Dr. Weiss's post-hearing testimony which proved that claimant had contracted and incurred a compensable lumbar spine occupational disease as the result of exposure to the hazards of his employment with Joslin Millwork?
- (i) Did the Industrial Commission violate the Claimant's right to procedural due process by applying the *Nelson* defense to deny the Claimant's occupational disease claim when the Commission failed to give Claimant proper written notice that the *Nelson* defense would be a disputed issue to be heard and decided at hearing in direct violation of Idaho Code 72-713?

- (j) Did the Industrial Commission violate the Claimant's right to procedural due process by failing to provide Claimant with a fair hearing before an impartial tribunal when the Commission acted like an advocate by raising and then applying the *Nelson* defense to deny the Claimant's occupational disease claim after the Defendants had expressly waived the *Nelson* defense on the record at the hearing?
- (k) Did the Industrial Commission err by requiring the Claimant to disprove the *Nelson* defense as an affirmative threshold element in the Claimant's prima facie case for a compensable occupational disease claim instead of properly treating the *Nelson* defense as an affirmative defense which must be raised and proved by the Defendants?
- (l) Did the Industrial Commission err by misapplying the *Nelson* defense when there was no substantial and competent evidence in the record to support the Commission's erroneous finding that the Claimant suffered from a preexisting condition in his low back prior to the onset of his occupational disease based on the definition of a preexisting condition set forth in *Nelson* and its progeny?
- (m) Did the Industrial Commission err by misapplying the *Nelson* defense by expanding the definition of a preexisting condition to include any degenerative finding discovered on an imaging study taken after the onset of the symptoms from the Claimant's subsequent occupational disease?
- (n) Did the Industrial Commission err by concluding that the Claimant suffered from underlying degenerative joint disease and arthritis in his low back prior to the onset of his lumbar spine occupational disease symptoms when the results of the Claimant's

December 13, 2005 lumbar spine X-ray provided substantial and competent evidence that the Claimant's low back was healthy and negative for pathology in December of 2005?

- (o) Did the Industrial Commission misapply the *Nelson* defense by treating the results of the Claimant's January 23, 2008 lumbar spine MRI scan as retroactive proof of the existence of a preexisting condition when *Nelson* and its progeny require the Claimant's preexisting condition to be medically documented or admitted to exist prior to the onset of symptoms from the subsequent occupational disease?
 - (p) Did the Industrial Commission misapply the *Nelson* defense by treating generic low back pain which came on spontaneously without accident or injury as a preexisting condition when the Claimant's subsequent occupational disease symptoms presented as a disk herniation at L5-S1 with extruded fragment accompanied by left buttock cramping that radiated down the back of the Claimant's left leg to his knee?
 - (q) Whether claimant is entitled to attorney's fees and costs pursuant to Idaho Code §72-804 and Rule 41 I.A.R.?
- 4. No portion of the record has been sealed by order of the Commission or a Court.
 - 5. The appellant requests the preparation of the entire reporter's standard transcript as defined in Rule 25(a), I.A.R.) in ☐ hard copy ☐ electronic format ☒ both (check one). However, on information and belief, Claimant / Appellant represents that the court reporter has already filed the original transcript of the December 19, 2008 hearing with the Industrial Commission and provided both Claimant and Defendants with a copy.

6. The appellant requests the following documents to be included in the Industrial Commission's / agency's record in addition to those automatically included under Rule 28, I.A.R.:

- (a) Claimant's 6.11.08 Notice of Service of Claimant's Discovery Requests To Defendants
- (b) Defendants' 7.8.08 Certificate of Service
- (c) Claimant's 8.4.08 Motion For Emergency Hearing
- (d) Claimant's Affidavit In Support of Motion For Emergency Hearing
- (e) Affidavit of Rick D. Kallas In Support of Motion For Emergency Hearing
- (f) Defendant's 8.7.08 Objection To Claimant's Motion For Emergency Hearing
- (g) Claimant's 8.8.08 Response To Defendant's Objection To Claimant's Motion For Emergency Hearing
- (h) August 25, 2008 ORDER GRANTING MOTION FOR EMERGENCY HEARING
- (i) Defendants' 10.10.08 Certificate of Service
- (j) Defendants' 12.8.08 Pre-Hearing Notice of Witnesses, Exhibits and Post-Hearing Depositions
- (k) Defendants' 12.8.08 Notice of Taking Post-Hearing Deposition of Dr. Weiss
- (l) Defendants' 12.23.08 Notice of Taking Post-Hearing Deposition of Dr. Weiss
- (m) February 9, 2009 Stipulation To Augment Claimant's Hearing Exhibit No. 8
- (n) Claimant's 4.13.09 Opening Post-Hearing Brief
- (o) Defendants' 5.1.09 Responsive Brief

- (p) Claimant's 5.7.09 Reply Brief
 - (q) Claimant's 6.26.09 Motion For Correction of Erratum and Motion For Reconsideration
 - (r) Claimant's June 26, 2009 Brief In Support of Motion For Correction of Erratum and Motion For Reconsideration
 - (s) Defendants' 7.6.09 Response to Claimant's Motion For Correction of Erratum and Motion For Reconsideration
 - (t) Claimant's 7.8.09 Reply to Defendants' Response to Claimant's Motion For Correction of Erratum and Motion For Reconsideration and Claimant's Motion To Strike Undisclosed Medical Opinions
 - (u) Defendants' 7.13.09 Response to Claimant's Motion To Strike Undisclosed Medical Opinions
 - (v) Claimant's 7.20.09 Reply to Defendants' Response to Claimant's Motion To Strike Undisclosed Medical Opinions
7. The Claimant / Appellant requests that all of the Claimant's Emergency Hearing Exhibits 1 - 14; all of the Defendants' Emergency Hearing Exhibits A - G and the January 27, 2009 deposition transcript of the Defendants' IME medical expert, Michael S. Weiss, M.D., that was filed and / or lodged with the Industrial Commission on or about March 20, 2009 be copied and sent to the Idaho Supreme Court as part of the record on appeal.
8. I certify:
- (a) That a copy of this notice of appeal has been served on the reporter of the December 19,

2008 hearing, M. Dean Willis, CSR No. 95, C/O M.D Willis Certified Shorthand Reporters,
P.O. Box 1241, Eagle, Idaho 83616.

(b) (1) ☒ That the clerk of the administrative agency has been paid the estimated fee for preparation of the reporter's transcript. The original transcript of the 12.19.08 hearing has been filed by the reporter with the Industrial Commission and a copy of the transcript has already been provided to both Claimant and Defendants. The undersigned e-mailed the reporter of the 12.19.08 hearing and confirmed that no additional fees needed to be paid for the reporter's transcript.

(2) ☐ That the appellant is exempt from paying the estimated transcript fee because:

(c) (1) ☒ That the estimated fee of \$100.00 for preparation of the agency's record has been paid to the clerk of the Industrial Commission concurrent with the filing of the Claimant / Appellant's Notice of Appeal.

(2) ☐ That the appellant is exempt from paying the estimated fee for the preparation of the record because:

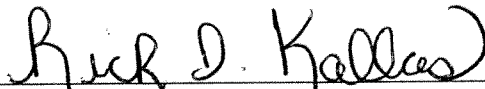
(d) (1) ☒ That the appellate filing fee has been paid.

(2) ☐ That appellant is exempt from paying the appellate filing fee because:

(e) That service has been made upon all parties required to be served pursuant to Rule 20 (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code).

DATED this 24th day of November, 2009.

ELLSWORTH, KALLAS, TALBOY & DeFRANCO, P.L.L.C


Rick D. Kallas – Of the Firm
Attorney's For Claimant / Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of November, 2009, I mailed a true and correct copy of the foregoing NOTICE OF APPEAL, postage prepaid, to the following:

E. Scott Harmon
Law Offices of Harmon, Whittier & Day
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-6358

M.D. Willis
Certified Shorthand Reporters
P.O. Box 1241
Eagle, ID 83616

Robert A. Watson
P.O. Box 421
McCall, Idaho 83638


Rick D. Kallas
Attorney For Claimant / Appellant

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT A. WATSON,

Claimant/Appellant,

v.

JOSLIN MILLWORK, INC., Employer,
and LIBERTY NORTHWEST INSURANCE
CORPORATION, Surety,

Defendants/Respondents.

SUPREME COURT NO. 37166

CERTIFICATE OF APPEAL

Appeal From:

Industrial Commission, Chairman, R.D. Maynard,
presiding.

Case Number:

IC 2008-017579

Order Appealed from:

Findings of Fact, Conclusions of Law, and
Recommendation, filed 6/8/09; and Order, filed
6/8/09, and Order on Reconsideration and Pending
Motions, filed 10/14/09.

Attorney for Appellant:

Rick D. Kallas
1031 E. Park Blvd
Boise, ID 83712

Attorney for Respondents:

Scott Harmon
PO Box 6358
Boise, ID 83707

Appealed By:

Claimant/Appellant

Appealed Against:

Defendants/Respondents

CERTIFICATE OF APPEAL- WATSON - 1

RECEIVED
SUPREME COURT
NOV 27 2009

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| Supreme Court | Court of Appeals |
| Entered on ATS by | DB |

189

Notice of Appeal Filed: 11/24/09

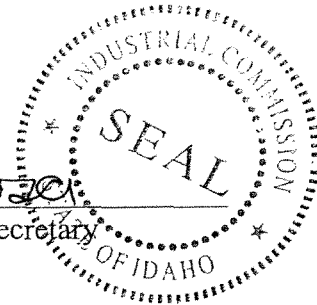
Appellate Fee Paid: \$86.00

Name of Reporter: M. D. Willis

Transcript Requested: Standard transcript has been requested. Transcript has been prepared and filed with the Commission.

Dated: 11/25/09


Assistant Commission Secretary



CERTIFICATION

I, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal, Findings of Fact, Conclusions of Law, and Recommendation, and Order, and Order on Reconsideration and Pending Motions, and the whole thereof, in IC case number 2008-017579 for Robert A. Watson.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 25th day of November, 2009.

Lina Espinoza
Assistant Commission Secretary



CERTIFICATION OF RECORD

I, Gina Espinosa, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 37166 on appeal by Rule 28(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the Certificate of Exhibits (i). Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Record herein.

DATED this 29th day of December, 2009.

Gina Espinosa
Assistant Commission Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT A. WATSON,

Claimant/Appellant,

v.

JOSLIN MILLWORK, INC., Employer,
and LIBERTY NORTHWEST INSURANCE
CORPORATION, Surety,

Defendants/Respondents.

SUPREME COURT NO. 37166

NOTICE OF COMPLETION

TO: STEPHEN W. KENYON, Clerk of the Courts; and
Rick D. Kallas, for the Appellants; and
E. Scott Harmon, for the Respondent.

YOU ARE HEREBY NOTIFIED that the Agency's Record was completed on this date and,
pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served
by regular U.S. mail upon each of the following:

RICK D KALLAS
1031 E PARK BLVD
BOISE ID 83712

E SCOTT HARMON
PO BOX 6358
BOISE ID 83707

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all
parties have twenty-eight days from this date in which to file objections to the Record, including
requests for corrections, additions or deletions. In the event no objections to the Agency's Record
are filed within the twenty-eight day period, the Transcript and Record shall be deemed settled.

DATED this 29th day of December, 2009.

Dina Espinoza
Assistant Commission Secretary

